Montreal 1967
Dec. 12, 14-15
Ottawa 1968
Jan. 26

BETWEEN:

D.W.S. CORPORATION ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Income tax—Deductions—Money borrowed and loaned to subsidiary—Whether used to earn income from business or property of parent company.

Income tax—Deductions—Foreign exchange premium in payment of long-term indebtedness on trading account—Consistency of accounting practice.

In 1959 appellant, which was in the business of manufacturing, etc. whiskey, borrowed $3,485,000 from a Canadian subsidiary at 6% per annum and advanced that sum to a U S subsidiary on a demand note without interest to enable the latter company to finance the purchase of a large quantity of unmatured Scotch fillings for maturing in Scotland over a period of years In 1963 the U.S. subsidiary transferred the Scotch fillings to appellant and paid appellant $10,000 as remuneration for the loan In its tax returns for 1960, 1961 and 1962, appellant claimed a deduction of the interest paid on the borrowed money.

On August 31st 1961, the last day of its 1961 fiscal year, appellant (as a result of a suggestion by the income tax authorities) paid an indebtedness of $3,051,000 in U.S. funds, the balance owing a U.S.

supplier on whiskey and other items of a current nature purchased over a period of several years. This indebtedness had been recorded at par in appellant's accounts. The Canadian dollar had for years been above par in terms of U.S. dollars but declined to below par during appellant's 1961 fiscal year and appellant was obliged to pay a premium of $96,364 to obtain the U.S. dollars required. In its 1961 tax return appellant claimed a deduction of the premium so paid. Prior to this transaction appellant's accounting practice had been to record purchases and sales in U.S. dollars at the prevailing exchange rate for Canadian dollars and when subsequently making payment to record any change in the amount of Canadian dollars required.

Held, allowing the appeal in part:

1. The interest paid was not deductible because the borrowed money was not used to earn income either from appellant's business or from its property as required by s. (11)(1)(*c*) of the *Income Tax Act*. *Canada Safeway Ltd. v. M.N.R.* [1957] S.C.R. 717, applied

2. The foreign exchange premium was deductible in computing appellant's income for 1961 because (a) it was paid in that year in satisfying a loss on trading account in accordance with the accounting method appellant had been following, and because (b) it was a loss sustained on trading account in 1961 as a result of the decline of the Canadian dollar and which was merely measured by the transaction of August 31st 1961 *Eli Lilly & Co. (Can) Ltd. v. M.N.R.* [1955] S.C.R. 745; *Typ Top Tailors Ltd. v M.N.R.* [1957] S.C.R. 703; *Can. Gen. Elec. Co. v. M.N.R.* [1962] S.C.R. 3, referred to.

INCOME TAX APPEAL.

Jacques M. Tétreault for appellant.

Alban Garon and *Pierre H. Guilbault* for respondent.

THURLOW J.:—This is an appeal from re-assessments of income tax for the years 1960, 1961 and 1962. In respect of each of these years there is in issue the claim of the appellant to deduct, in the computation of its income for income tax purposes, the interest paid by the appellant on an amount of $3,485,000 borrowed by it on September 4, 1959 from Caus Investment and Finance Company Limited, a subsidiary of the appellant, allegedly for the purpose of earning income from the appellant's business. The Minister's position on this issue is that the borrowed money was not used to earn income from the appellant's business or property but was used to finance the operations of World T. and I. Corporation, another subsidiary of the appellant.

Issues were also raised on the right of the appellant to deduct interest paid on a further amount of $185,000 borrowed by the appellant from Caus Investment and Finance

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Company Limited on September 4, 1960 and on a further amount of $180,000 borrowed by the appellant from Caus Investment and Finance Company Limited on September 4, 1961 but the evidence showed that these two borrowed amounts were used as working capital in the appellant's business and the Minister's case with respect to the deductibility of the interest thereon was abandoned by counsel in the course of the argument. The appeal on these issues accordingly succeeds.

In respect of the year 1961 there is a further issue as to the right of the appellant to deduct a loss of $96,364 on foreign exchange which is alleged to have been incurred in paying to Schenley Industries Inc., of which the appellant is a subsidiary, a debt payable in United States funds for inventories, supplies and other items of a current nature. On this issue the Minister's position is that the loss was not a business loss deductible from income under the provisions of section 12(1)(*a*) but was a loss on account of capital the deduction of which is prohibited by section 12(1)(*b*) of the *Income Tax Act*.

The material before the Court on both of the issues which remain to be determined consists in part of admissions contained in the notice of appeal and reply and in an agreed statement of facts and in part of oral and documentary evidence adduced in the course of the trial.

The appellant was incorporated in 1945 under the *Companies Act* of Canada by the name of Canadian Schenley Limited and since then has carried on the business of distilling, aging, blending, bottling, labelling and selling Canadian whiskeys and on occasion buying and selling other spirits. During the years here in question its business was carried on only in Canada. The name of the appellant was changed to D.W.S. Corporation in 1964.

World T. and I. Corporation is a foreign corporation organized in 1959 with its principal office in New York. During the years in question it was engaged in the business of buying Canadian whiskeys from the appellant and selling them in the United States and elsewhere, other than in Canada, and of buying and selling throughout the world certain types of whiskeys distilled in the United States and Scotch whiskeys which it matured itself or which it purchased as matured whiskeys.

Caus Investment and Finance Company Limited was incorporated under the *Companies Act* of Canada and was an investment company.

The immediate object of the transactions of September 4, 1959 was to arrange the financing of the purchase by World T. and I. Corporation in Scotland of an exceptionally large quantity of unmatured Scotch fillings. These, it was intended, would remain in Scotland for several years during which the maturing process would be going on and warehousing and other costs would be accumulating and when withdrawn from the warehouse would be blended and imported into the United States and there bottled and sold. In the transactions in question the appellant borrowed $3,485,000 in United States funds from Caus Investment and Finance Company Limited, which was evidenced by a promissory note payable on demand with interest at six per cent and thereupon advanced the amount so borrowed together with an additional $15,000 in United States funds derived from other sources to World T. and I. Corporation which used it to pay for the Scotch fillings. The loan to World T. and I. Corporation was also evidenced by a demand promissory note which was dated at New York and was silent as to interest. A journal entry of the appellant dated September 1959, which was offered in evidence (Exhibit 4) without oral explanation or elaboration as to how it came to be made or who made it, recorded the borrowing of $3,321,641 by the appellant from Caus Investment and Finance Company Limited and the loaning of it to World T and I. Corporation with the following explanation:

> To record portion of demand loan receivable from World T & I and demand loan payable to Caus Investment resulting from the loan by Caus to Cdn Schenley of $3,485,000 U.S. Funds which in turn was loaned by Cdn Schenley to World T & I Corp. Loan of $3,485,000 U.S. Funds converted at 4 11/16 to arrive at $3,321,641. Loan from Caus bears 6% interest, loan to World T & I is non-interest bearing.

In 1963, as a result of a change, the precise nature of which was not explained, in the revenue laws of the United States applicable to World T. and I. Corporation a decision was made to transfer the ownership of the Scotch fillings to the appellant and in August of that year this was done, some of the fillings being transferred to the appellant in

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satisfaction of the loan obligation, others as a dividend in kind and the remainder by a reduction of the capital of World T. and I. Corporation. Thereafter the fillings were disposed of by the appellant over a period of years and the appellant thus became the recipient of the revenues from their sale.

In the latter part of 1963 a payment of $10,000 as remuneration for the use of the borrowed money was made by World T. and I. Corporation to the appellant pursuant to an agreement set out in a letter from the appellant to World T. and I. Corporation dated August 26, 1963 the body of which read as follows:

> Reference is made to conversations which we have had relating to your demand loan from us, dated September 4th, 1959, in the principal amount of $3,500,000.00, and its repayment on August 19th, 1963. We have concurred that this note, being payable on demand, bore no other fixed date of maturity. Also, no reference to interest payable on said note was indicated thereon, it having been mutually agreed at time of issuance that this might be a subject for discussion at a later date and the subject of a later agreement.
>
> As stated above, you have discharged the principal amount of said indebtedness on August 19th, 1963. Furthermore, we now confirm that you shall compensate us in full for the use of this money by paying to us, in addition to the above-mentioned principal amount of $3,500,000 00, interest in the amount of $10,000.00. We also confirm that our receipt of said payment of $10,000 00 shall discharge in full your obligations arising out of said demand note. For reasons given by you, this payment of $10,000.00 will not become due until November 1st, 1963, and we hereby confirm our agreement to this arrangement.
>
> Please acknowledge your concurrence in this determination by signing and returning the enclosed copy of this letter.

In the same month of August 1963 Caus Investment and Finance Company Limited was wound up and the indebtedness of the appellant to it was extinguished on the distribution of its assets to the appellant as its sole shareholder. In each of the years 1960, 1961 and 1962, however, the appellant had paid Caus Investment and Finance Company Limited an amount in the vicinity of $200,000 as interest on the loan and it is the deductibility of these sums in computing the appellant's income for tax purposes that is in issue.

I should add at this point that there is evidence given by Mr. Arthur W. Gilmour, a chartered accountant, who as financial adviser and consultant on Canadian tax matters

to the Schenley companies participated in meetings of senior officers of the appellant and its parent company, that the senior officers of the various subsidiary companies of the Schenley group were jealous of the profit showings of the companies for which they were responsible and that it was the policy of the senior officers of the parent company to allocate revenues to each subsidiary company so that it would be able to reflect in its profit and loss statements its fair share of the profits or losses arising from ventures to which more than one of them had in some way contributed. He went on to say that at the time of the making of the loan to World T. and I. Corporation no decision had been made as to whether the fillings would be marketed in the United States by that company and that no decision had been made with respect to a rate of interest to be paid for the use of the money since the venture in purchasing the whiskey was hazardous and its results were not predictable. He expressed himself as sure, however, that had World T. and I. Corporation held the fillings to maturity and marketed them the appellant would have pressed in the councils of the organization for interest for the use of the money over the lengthy period involved. The witness also said that at one point during the currency of the loan he was asked to make a report on the reasons for the reduced state of the appellant company's earnings which reduction was in part due to the fact that it was receiving no income from the use of the borrowed money but was paying interest on its own loan from Caus Investment and Finance Company Limited at six per cent and that when the decision was made that the fillings should be transferred to the appellant it was considered that since the appellant would be receiving the revenues from the marketing of the fillings it would be amply reimbursed for the use of the money during the time it was on loan to World T. and I. Corporation and that the president of the appellant was well satisfied that the arrangement afforded satisfactory remuneration therefor. Mr. Gilmour also said that it was intended at the time of the making of the loan that interest would be charged though the amount or rate could not then be determined and that it was he who recommended in 1963 that the token payment of $10,000 as remuneration be paid.

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In the view I take of the matter the transaction in which the exceptional quantity of Scotch fillings was purchased was entirely that of World T. and I. Corporation for its own account and there was at that time neither any agreement for sharing with the appellant any profits or losses that might arise from the venture nor any agreement to remunerate the appellant for the use of the money loaned to it over the rather lengthy period for which it would be required whether at a particular rate of interest or at interest the rate or amount of which would be determined later or at all. The appellant as the owner of all the shares of World T. and I Corporation was no doubt in a position to determine what World T. and I. Corporation would do, and might either by the exercise of that power or by demanding payment of the loan put World T. and I. Corporation in a position where it could not successfully decline to pay interest but in the way matters stood throughout the relevant period there was as between the two corporations no right accruing to the appellant to interest or to any other kind of remuneration. On this point I regard it as being of some significance that in referring in his letter of August 26, 1963 to what occurred at the time of the loan on the subject of interest the president of the appellant company stated that it was agreed that interest might be a subject for discussion at a later date and the subject of a later agreement and did not use an unequivocal expression indicative of an agreement at that time that remuneration in some form was to be paid. This to my mind falls short of saying that it was intended at the time either that interest at some rate was to be paid or that interest was to be charged. It is also of significance that no decision had been made as to who would market the fillings when they were matured and that no rate of interest had been determined. This to my mind indicates that the whole subject of remuneration for use of the money was in abeyance and that no decision had been made that any remuneration would be allocated or paid.

Moreover, Mr. Gilmour's statement that it was intended at the time that interest would be charged suffers both from the fact that it was made in response to a leading question put by counsel for the appellant and even more from the fact that it is an expression by the witness of a

conclusion as to what was in someone else's mind rather than a statement of known facts from which the Court might draw a conclusion one way or another on the critical point. To my mind this is not acceptable as evidence of what in fact was intended. Even if it were acceptable as evidence of someone's intention—the witness did not say whose intention it was—there is a difference between someone's intention to charge interest at some undetermined rate at some later time and a present arrangement between a prospective payor and payee that interest at some reasonable rate having regard to circumstances and relevant considerations will be paid. Here there is, in my view, no evidence of any such arrangement binding World T. and I. Corporation during the relevant period to pay anything whatever as remuneration for use of the borrowed money.

In a case of this kind, that is to say, one in which the taxpayer is not engaged in a business which itself involves the borrowing of money and the payment of interest thereon, the deductibility of interest in computing income for tax purposes turns on section 11(1)(*c*) of the *Income Tax Act* by which it is provided that:

> 11.(1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year:
>
> (*c*) an amount paid in the year or payable in respect of the year (depending upon the method regularly followed by the taxpayer in computing his income), pursuant to a legal obligation to pay interest on
>
> (i) borrowed money used for the purpose of earning income from a business or property (other than borrowed money used to acquire property the income from which would be exempt),
>
> ...
>
> or a reasonable amount in respect thereof, whichever is the lesser;

For the purpose of determining the present issue the critical words of the section are "borrowed money used for the purpose of earning income from a business or property" and the question which they raise is whether in the circumstances described the $3,485,000 in United States funds which the appellant borrowed from Caus Investment and Finance Company Limited on September 4, 1959 was in the years 1960, 1961 and 1962 *used for the purpose of earning income from* (the appellant's) *business or property*

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when, throughout the material period, the borrowed money remained on loan to the appellant's subsidiary, World T. and I. Corporation, with no agreement in effect under which remuneration for the use of the money was being earned or would be or become payable.

So far as the appellant's claim to deduct the interest may be based on the submission that the borrowed money was used for the purpose of earning income from the appellant's business the matter, in my view, is concluded against the appellant by the judgment of the Supreme Court in *Canada Safeway Limited v. M.N.R.*[1]. In that case the appellant sought to deduct interest on borrowed money used to purchase shares and thus to acquire control of a company which was one of its suppliers. By securing control of this company the appellant was able to obtain trading advantages over competitors which resulted in enhanced profits from the appellant's business. The Court, however, held the interest on the borrowed money not deductible not alone because the dividends from the shares would constitute exempt income but also because the borrowed money was not used in the appellant's business. With respect to the 1947 and 1948 taxation years, to which the *Income War Tax Act* applied, Kerwin C.J. speaking for himself and Taschereau J. (as he then was) said at page 723:

> Reliance was placed upon subs. (1)(*b*) of s. 5, but the exemption and deduction there contemplated of "such reasonable rate of interest on borrowed capital used in the business to earn the income as the Minister in his discretion may allow" do not apply, first, because the money borrowed on the debentures was not used by the appellant in its own business to earn the income and . . .

Reference was then made to sections 11, 12 and 27 and 127(1) of the 1948 *Income Tax Act* and the learned judge observed at page 724:

> Generally speaking, these enactments have the same effect as those applicable to the 1947-1948 taxation years and, if anything, the definitions included in the *Income Tax Act* clarify the situation.

Rand J., referring to section 11(1)(*c*)(i), said at page 728:

> The language in (i) "used for the purpose of earning income from a business" corresponds with that of s. 5(1)(*b*) of the repealed Act and to what has been said on the latter there is nothing to be added: the business of the subsidiary is not that of the company.

[1] [1957] S.C.R. 717.

Earlier Rand J. had said at page 727:

> It is important to remember that in the absence of an express statutory allowance, interest payable on capital indebtedness is not deductible as an income expense. If a company has not the money capital to commence business, why should it be allowed to deduct the interest on borrowed money? The company setting up with its own contributed capital would, on such a principle, be entitled to interest on its capital before taxable income was reached, but the income statutes give no countenance to such a deduction. To extend the statutory deduction in the converse case would add to the anomaly and open the way for borrowed capital to become involved in a complication of remote effects that cannot be considered as having been contemplated by Parliament. What is aimed at by the section is an employment of the borrowed funds immediately within the company's business and not one that effects its purpose in such an indirect and remote manner.

I shall therefore hold that the borrowed money here in question was not during the relevant period *used for the purpose of earning income from* (the appellant's) *business* within the meaning of section 11(1)(*c*) of the Act.

The submission was, however, made that the borrowed money was used for the purpose of earning income from the appellant's property, that is to say, the demand note given by World T. and I. Corporation or the property right which it evidenced. It was not suggested that the money was used for the purpose of earning income in the form of dividends from World T. and I. Corporation but I do not think such a contention would be tenable anyway since such dividends, if received, would, I think, be income from the appellant's property in the shares of World T. and I. Corporation rather than from the property right evidenced by the demand note. On this point Rand J. in *Canada Safeway Limited v. M.N.R.* said at page 728:

> The word "property" is introduced in paras. (i) and (ii) but I cannot see that it can help the appellant: the language
>
> *borrowed money used for the purpose of earning income from ... property (other than property the income from which is exempt)*
>
> in (i) means the income produced by the exploitation of the property itself. There is nothing in this language to extend the application to an acquisition of "power" annexed to stock, and to the indirect and remote effects upon the company of action taken in the course of business of the subsidiary.

Though in the present case there was no use of the borrowed money to purchase stock to obtain "power" or control over World T. and I. Corporation I think that the possibility of increased dividends by lending to World T. and I. Corporation must be taken to be too remote to

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characterize the lending of the borrowed money to it without interest as use for the purpose of earning income from the property represented by the loan. It is the loan itself rather than the shares that I think Rand J. refers to when he says the statute means "the income produced by the exploitation of the property itself".

In my view, however, during the material time the possibility of increased dividends on the shares of World T. and I. Corporation held by the appellant was the only prospect of income even indirectly flowing from the use to which the appellant put the money it had borrowed from Caus Investment and Finance Company Limited. There was, in my view, as I have already said, no arrangement between the appellant and World T. and I. Corporation for sharing the profits or losses of the venture in purchasing the Scotch fillings or was there any other agreement or arrangement in effect pursuant to which remuneration in the form of interest or otherwise was accruing. Nor was interest or any other form of remuneration being received or claimed in the material period and this even though the effect of the loan on the company's affairs was being felt. Understandably nothing appeared in the appellant's financial statements for the years in question to reflect any income right arising from the loan to World T. and I. Corporation. The statement of Mr. Gilmour that if satisfaction had not been obtained through the transfer of the fillings to the appellant more interest than the token payment of $10,000 ultimately made would have been paid is moreover in my view merely speculation. As I see it, throughout the relevant period there was no right to more remuneration or to any remuneration. The $10,000 itself was not earned as interest. It was a lump sum payment, a mere token in amount and neither more nor less in substance than a gift which after the material time top management, on the advice of their tax consultant, required World T. and I. Corporation to pay to the appellant. In my opinion therefore the statutory requirement that the borrowed money be *used for the purpose of earning income from* (the appellant's) *property* was not satisfied.

The appeal on this issue accordingly fails.

I turn now to the foreign exchange loss which the appellant seeks to deduct in computing income for its fiscal period which ended on August 31, 1961. In the course of its

business the appellant purchases supplies of Bourbon whiskeys distilled in the United States, barrels, flavourings and other items of a current nature from other Schenley companies in the United States and elsewhere and sells to companies of this group both matured and unmatured liquors which it has produced in Canada. On the account of these transactions maintained by the appellant there was on August 31, 1961 a balance of $3,051,000 admittedly owing to Schenley Industries Inc. in United States funds. It is agreed that this indebtedness had been expressed at par in the appellant's accounts. Some of it had been outstanding for several years, the appellant having purchased some years earlier, on terms not requiring immediate payment, some large quantities of Bourbon fillings for re-distillation and further maturing in Canada before being marketed. At the beginning of the appellant's 1961 fiscal period that is to say on September 1, 1960 the balance owing by the appellant in this account had stood at $2,666,135 United States dollars and at that time and for some years prior thereto the Canadian dollar had been above par in terms of United States dollars. In the course of the 1961 fiscal year of the appellant, however, the value of the Canadian dollar declined and on August 31, 1961 was below par in United States dollars. On that date, as a result of a suggestion by the Canadian income tax authorities that because it had been outstanding for several years some of this indebtedness would not qualify for deduction in computing income until the year in which it was paid the appellant, on the advice of Mr. Gilmour, purchased the required number of United States dollars and paid off almost all of the balance owing in this and several other smaller accounts recording transactions of a current nature. It purchased the United States dollars, however, at a premium of $96,364, which is the item the deductibility of which is now in issue. Most of the funds necessary to purchase the required amount of United States dollars were raised by borrowing $3,100,000 Canadian dollars from Schenley Industries Inc.

Prior to this occasion the appellant had recorded foreign currency transactions on what the witness called a "cash" method. In it, on a sale or purchase of goods for United States dollars, the transaction would be entered at the amount thereof converted at the then prevailing exchange

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rate into Canadian dollars. No account would thereafter be taken of oscillations in the exchange rate until the transaction was completed by actual payment on which date appropriate entries would be made to record any change in the amount of Canadian dollars required to complete the transaction. It was in this context that Mr. Gilmour recommended some time during the 1961 fiscal period, when the suggestion by the Canadian tax authorities with respect to the non-deductibility of items in the merchandising account was made, that the balance in the merchandising account be settled by actual payment at the end of each fiscal period. Such settlement was, however, carried out only on the one occasion as in the 1962 fiscal period the appellant adopted an accrual method which differed from the earlier method in that at the end of the fiscal period the amount necessary to complete outstanding transactions was computed at the exchange rate prevailing on that date and profit or loss taken into income accordingly.

In my opinion the loss here in question was clearly deductible in computing income for the year 1961 not only because it resulted on the purchase of United States funds purchased for the purpose of discharging, and thereafter used to discharge, obligations incurred in trading transactions and thus represented a loss realized in the year in accordance with the accounting method which had been followed in earlier years and was being followed in the year in question but also because it represented a loss which had in fact been sustained on trading account in the year as a result of the decline in the value of the Canadian dollar and which was merely measured and determined by the transaction of August 31, 1961. *Vide Eli Lilly and Company (Canada) Ltd v. M.N.R.*,[2] *Tip Top Tailors Ltd v. M.N.R.*[3] and *Canadian General Electric Co. v. M.N.R.*[4]

Counsel for the Minister did not dispute the loss or the amount of it but made three submissions in support of the Minister's position. It was said first that the evidence showed that the appellant's liability for a large portion of the balance owing in the account had been in existence for more than ten years and that it should on that account be regarded as having been a capital rather than a trading

[2] [1955] S.C.R. 745.

[3] [1957] S.C.R. 703.

[4] [1962] S.C.R. 3.

obligation. With respect to this submission I am unable to see how, in the absence of any applicable statutory provision, the mere length of time in which the obligation was outstanding has any effect in a situation of this kind in changing what was, at the time it was incurred, a trading obligation into an obligation on capital account.

The second point made was that the loss in question was connected with an outlay that was not made for the purpose of gaining or producing income from the appellant's business within the meaning of the exception to section 12(1)(*a*) of the Act. It was said that the loss was incurred simply because the appellant decided to pay the debt when there was no business reason to do so. This submission treats the loss as having been caused by the transaction by which the debt was paid and disregards the fact that the liability to pay some three million United States dollars was incurred in the course of trading and thus was an expense incurred for the purpose of gaining or producing income. While the payment of that obligation, whenever made, would be in itself a transaction in the course of trading, that particular transaction could scarcely be an income producing or earning transaction even though the amount of the expense itself in terms of Canadian dollars might grow or decline as the exchange rate fluctuated. At any particular moment while the obligation was outstanding and the real extent of this obligation was the amount of Canadian funds necessary to purchase enough United States dollars to pay it, and whether or not in the accounting method which the appellant had followed, a profit or loss might, on the payment of the obligation, appear and be taken into income that profit or loss could not arise from the transaction itself. It could only arise from the fluctuation of the exchange rate while the obligation incurred in the course of trading remained outstanding. Whatever the reason for paying the obligation on any particular day the transaction itself, in my opinion, therefore could have no effect whatever in producing an exchange profit or loss but could simply quantify and determine once and for all an exchange profit or loss which had in fact arisen from other causes. In my view by paying the obligation the appellant was able to compute and show more accurately the profit from its business for the year than if the obligation had been left unpaid.

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Finally it was urged that the loss arose from an artificial transaction carried out when payment had not been demanded and solely for tax reasons and on that account as well should not be regarded as having been incurred for the purpose of gaining or producing income from the appellant's business. To my mind this submission is a mere extension of the previous submission and is also unmaintainable. The fact that payment had not been demanded is in my view irrelevant and the argument as a whole disregards the fact that the loss arose not from the transaction carried out on August 31, 1961, which no doubt was carried out for tax reasons, but from decline in the value of the Canadian dollar which made it necessary to use more Canadian dollars to meet, on whatever day payment might be made, an obligation incurred in the course of trading. By paying the account on the day chosen, regardless of the reason for deciding to do so, the appellant, in my view, merely quantified in Canadian dollars the extent of its trading obligation in United States dollars and thus determined once and for all the amount of a loss sustained in the year by not having discharged the obligation before the value of the Canadian dollar declined.

The appeal on this issue accordingly succeeds.

In the result, therefore, the appeal will be allowed to the extent indicated in these reasons. As the appellant has had substantial success it will be entitled to the general costs of the appeal but not including any items pertaining exclusively to the issue on which it has failed. The Minister may tax and set off against the costs so awarded to the appellant any taxable costs he may have incurred pertaining exclusively to the issue on which he has succeeded. On taxation one-third of the time taken for the trial is to be taken as applicable to the issue on which the Minister succeeded and two-thirds of the time to the issues on which the appellant succeeded.