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Blackwell J.

Accordingly, I think that the appellants fail in their contention that there is a charge on the premises in respect of the water supplied by measurement, and that this appeal fails upon that point.

As regards the question of personal liability, I agree that the water supplied by meter must be treated as apportionable *de die in diem*. That being so, it seems to me to be plain that defendant No. 3 incurred no liability until he became the owner of the premises. He has been content to take August 18, 1930, as the date from which his liability commenced, and it has been conceded that the sum of Rs. 75 paid by him into Court is sufficient to discharge his personal liability upon the footing that the amount is apportionable.

I agree, therefore, that on both the points this appeal fails and must be dismissed with costs.

Attorneys for appellants: Messrs. *Crawford, Bayley & Co.*

Attorneys for respondent: Messrs. *Dastur & Co.*

Appeal dismissed.

B. K. D.

PRIVY COUNCIL.

J. C.* 1935 *November* 18

THE NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA, LTD., APPELLANTS *v.* THE COMMISSIONER OF INCOME-TAX, BOMBAY PRESIDENCY AND ADEN, RESPONDENTS.

[On Appeal from the High Court at Bombay]

Indian Income-tax Act (XI of 1922)—Rules thereunder—Rule 35—Mutual Life Insurance Company Limited by guarantee—Participating and non-participating policy-holders—Participating shareholders entitled to whole of surplus profits—Company incorporated in Australia—Branches in British India—Method of calculating assessable profits in British India.

The appellant company was a Mutual Life Insurance Company incorporated in Australia with a Head Office in Melbourne and Branch Offices in Bombay and Calcutta.

**Present:* Lord Thankerton, Sir Lancelot Sanderson and Sir George Rankin.

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The company was a mutual association limited by guarantee and having no shares or shareholders. The holders of participating policies were the sole members of the company and entitled to the whole of the surplus profits.

The Income-tax Officer, acting under Rule 35, found the assessable profits of the company's Indian business for the year ending March 31, 1932, to be £38,038, on the basis that the assessable profits on the Indian business should bear the same proportion to the net assessable profits of the whole of the company's business as the premium income on participating and non-participating policies in British India to the total premium income of the company. His calculation was based on the figures for the year ending September 30, 1930.

It was not disputed that the principles in *New York Life Insurance Company* v. *Styles*[1] were applicable to the case as held in *Commissioner of Income-tax, Bombay Presidency* v. *The National Mutual Life Association of Australasia, Ltd.*[2]

Held, that it was impossible to regard the figure arrived at as a proper ascertainment of the income, profits or gains of the company. The Income-tax Officer had entirely ignored the non-participating premiums received, and on the other hand, had included the whole amount of consideration received in respect of annuities. Further he deducted nothing in respect of the liabilities of the company, or for the expenses relative to the non-participating business. The assessment was therefore not a valid or legal assessment.

Decree of the High Court, 57 Bom. 519, reversed.

APPEAL (No. 50 of 1934) from an order of the High Court (February 27, 1933) answering a reference under the Income-tax Act.

The facts of the case are stated in the judgment of their Lordships of the Judicial Committee.

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Latter, *K. C.* and *King*, for the appellants. The questions are what profits arise in India and what proportion of the profits represents non-mutual business. A Life Insurance Company has no profit and loss account. It has a revenue account and an actuarial valuation. Rule 35 applies only in the absence of sufficient data. Sufficient data was furnished by the company. Profits and gains in India have been correctly stated in the return. Profits of foreign income do not fall within sections 3, 4 or 6 to 10 of the Act. Investment stage has nothing to do with business connection. The full amount of the moneys remitted to Australia were shown and also the average

(1) (1889) 14 App. Cas. 381. (2) (1931) 55 Bom. 637.

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interest on the Assurance Fund. The Income-Tax Officer's method of computing the profits was wrong.

The method adopted by the Income-tax Officers was referred to and reference was made to the following cases. *Chief Commissioner of Income-tax* v. *Bhanjee Ramjee & Co.*,[1] *The Commissioner of Income-tax, Burma* v. *Messrs. Steel Brothers & Co., Ltd.*,[2] *New York Life Insurance Company* v. *Styles*,[3] *Thomas* v. *Richard Evans & Co. Jones* v. *South-West Lancashire Coal Owners' Association*,[4] *Jones* v. *South-West Lancashire Coal Owners' Association*[5] and *Commissioner of Income-tax, Bombay Presidency* v. *The National Mutual Life Association of Australasia, Ltd.*[6]

Dunne K. C. and *Hills*, for the respondent. The question falls to be determined on whether the company put the necessary data before the Income-tax Officer. The company has to render an account under section 22 of the Act. If not satisfied, the Income-tax Officer acts under section 23. Rule 35 shows how the assessment is to be made. Profits may be made by investment. The Indian Branches are entitled to participate in the Life Fund. Profits on this would be taxable in India.

Reference was made to *Commissioner of Income-tax* v. *Remington Typewriter Co. Ltd.*,[7] *Income-tax Commissioner* v. *Shaw Wallace & Co.*,[8] and to the Indian Life Insurance Act (VI of 1922). If the principle of *Styles's* case[3] applies, the profit can be got only from actuarial valuation.

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The judgment of their Lordships was delivered by LORD THANKERTON. This is an appeal from a judgment of the High Court of Judicature at Bombay, dated February 27, 1933, whereby the Court answered adversely to the appellants two questions of law, which had been referred to the

(1) (1921) 44 Mad. 773.
(2) (1925) 3 Rang. 614.
(3) (1889) 14 App. Cas. 381.
(4) [1927] 1 K. B. 33.
(5) [1927] A. C. 827.
(6) (1931) 55 Bom. 637.
(7) (1930) 55 Bom. 243, s. c. L. R. 58 I. A. 42.
(8) (1932) L. R. 59 I. A. 206; 59 Cal. 1343.

Court by the Commissioner of Taxes, Bombay Presidency, on his own motion, under section 66 (*1*) of the Indian Income-tax Act (XI of 1922).

The appellants are a mutual life insurance company, whose head office is in Melbourne, Australia. They have branches all over the world, and in India they have two branches, one of which is in Bombay and the other in Calcutta. The questions of law arise out of a dispute as to the method of computation of the income, profits or gains of the appellant company in the business of its Indian branch offices for the purpose of its assessment to income-tax for the financial year ending on March 31, 1932.

The facts are set out in the letter of reference and may be summarised as follows:—The company is limited by guarantee and has no share capital, the liability of each member being limited to the nominal sum of £1. Every person who insures his life with the company under a participating policy is deemed to have agreed to become a member of the company. There are no shareholders and all the surplus profit is divided amongst the members, who are the persons who take out participating policies. The company also does business in annuities, loans on the security of policies, etc.

Under article 85 of the articles of association a triennial actuarial valuation is made by the actuary of the Company for all its business, and the surplus profit for the three years thus ascertained is distributed amongst the participating policy holders. As originally framed, this article provided for a separate valuation for each branch or class of the company's business, but this has now been altered and only a consolidated valuation report is drawn up including all the company's business. The articles do not provide for a separate valuation of the business of branch offices, and it is not stated whether in fact such separate valuations have been made.

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From the documents submitted along with the letter of reference it appears that approximately 98 per cent. of the company's total business is done with its members, the participating policy-holders. Before the Board, it was accepted throughout by both parties that the principles laid down in the English case of *New York Life Insurance Company* v. *Styles*,[1] apply in India; this was decided by the High Court in a case between the parties to this appeal in *Commissioner of Income-tax, Bombay Presidency* v. *The National Mutual Life Association of Australasia, Ltd.*,[2] and, while not meaning thereby to imply any doubts, their Lordships need not and do not express any opinion on this matter.

The following are the material provisions of the Indian Income-tax Act, 1922, and the statutory rules made thereunder:—

3. Where any Act of the Indian Legislature enacts that income-tax shall be charged for any year at any rate or rates applicable to the total income of an assessee, tax at the rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, this Act in respect of all income, profits and gains of the previous year of every individual, Hindu undivided family, company, firm and other association of individuals.

4. (*1*) Save as hereinafter provided, this Act shall apply to all income, profits or gains, as described or comprised in section 6, from whatever source derived, accruing or arising, or received in British India or deemed under the provisions of this Act to accrue, or arise, or to be received in British India.

(*2*) Profits and gains of a business accruing or arising without British India to a person resident in British India shall, if they are received in or brought into British India, be deemed to have accrued or arisen in British India and to be profits and gains of the year in which they are so received or brought, notwithstanding the fact that they did not so accrue or arise in that year, provided that they are so received or brought in within three years of the end of the year in which they accrued or arose.

10. (*1*) The tax shall be payable by an assessee under the head "Business", in respect of the profits or gains of any business carried on by him.

13. Income, profits and gains shall be computed, for the purposes of sections 10, 11 and 12 in accordance with the method of accounting regularly employed by the assessee: Provided that, if no method of accounting has been regularly employed, or if the method employed is such that, in the opinion of the Income-tax Officer, the

[1] (1889) 14 App. Cas. 381. [2] (1931) 55 Bom. 637.

income, profits and gains cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income-tax Officer may determine.

22. (*1*) The Principal officer of every company shall prepare, and, on or before the fifteenth day of June in each year, furnish to the Income-tax Officer a return, in the prescribed form and verified in the prescribed manner, of the total income of the company during the previous year: Provided that the Income-tax Officer may, in his discretion, extend the date for the delivery of the return in the case of any company or class of companies.

(*4*) The Income-tax Officer may serve on the principal officer of any company or on any person upon whom a notice has been served under sub-section (*2*) a notice requiring him, on a date to be therein specified, to produce, or cause to be produced, such accounts or documents as the Income-tax Officer may require: Provided that the Income-tax Officer shall not require the production of any accounts relating to a period more than three years prior to the previous year.

23. (*1*) If the Income-tax Officer is satisfied that a return made under section 22 is correct and complete, he shall assess the total income of the assessee, and shall determine the sum payable by him on the basis of such return.

(*2*) If the Income-tax Officer has reason to believe that a return made under section 22 is incorrect or incomplete, he shall serve on the person who made the return a notice requiring him, on a date to be therein specified, either to attend at the Income-tax Officer's office or to produce, or to cause to be there produced, any evidence on which such person may rely in support of the return.

(*3*) On the day specified in the notice issued under sub-section (*2*), or as soon afterwards as may be, the Income-tax Officer, after hearing such evidence as such person may produce and such other evidence as the Income-tax Officer may require, on specified points, shall, by an order in writing, assess the total income of the assessee, and determine the sum payable by him on the basis of such assessment.

(*4*) If the principal officer of any company or any other person fails to make a return under sub-section (*1*) or sub-section (*2*) of section 22, as the case may be, or fails to comply with all the terms of a notice issued under sub-section (*4*) of the same section or, having made a return, fails to comply with all the terms of a notice issued under sub-section (*2*) of this section, the Income-tax Officer shall make the assessment to the best of his judgment and, in the case of a registered firm, may cancel its registration.

Provided that the registration of a firm shall not be cancelled until fourteen days have elapsed from the issue of a notice by the Income-tax Officer to the firm intimating his intention to cancel its registration.

59. (*1*) The Central Board of Revenue may, subject to the control of the Governor General in Council, make rules for carrying out the purposes of this Act and for the ascertainment and determination of any class of income. Such rules may be made for the whole of British India or for such part thereof as may be specified.

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(2) Without prejudice to the generality of the foregoing power, such rules may—

(*a*) prescribe the manner in which, and the procedure by which, the income, profits and gains shall be arrived at in the case of :—

.....

(ii) insurance companies;

(3) In cases coming under clause (*a*) of sub-section (2), where the income, profits and gains liable to tax cannot be definitely ascertained, or can be ascertained only with an amount of trouble and expense to the assessee which, in the opinion of the Central Board of Revenue, is unreasonable, the rules made under that sub-section may—

(*a*) prescribe methods by which an estimate of such income, profits and gains may be made, and

(*b*) in cases coming under sub-clause (*i*) of clause (*a*) of sub-section (2), prescribe the proportion of the income which shall be deemed to be income, profits and gains liable to tax,

and an assessment based on such estimate or proportion shall be deemed to be duly made in accordance with the provisions of this Act.

Rule 25. In the case of Life Assurance Companies incorporated in British India whose profits are periodically ascertained by actuarial valuation, the income, profits and gains of the Life Assurance Business shall be the average annual net profits disclosed by the last preceding valuation, provided that any deductions made from the gross income in arriving at the actuarial valuation which are not admissible for the purpose of income-tax assessment, and any Indian income-tax deducted from or paid on income derived from investments before such income is received, shall be added to the net profits disclosed by the valuation.

Rule 26. Rule 25 shall apply also to the determination of the income, profits and gains derived from the annuity and capital redemption business of life assurance companies, the profits of which can be ascertained from the results of an actuarial valuation.

Rule 27. If the Indian income-tax deducted from interest on the investments of a company exceeds the tax on the income, profits and gains thus calculated, a refund may be permitted of the amount by which the deduction from interest on investments exceeds the tax payable on such income, profits and gains.

Rule 35. The total income of the Indian branches of non-resident insurance companies (Life, Marine, Fire, Accident, Burglary, Fidelity Guarantee, etc.), in the absence ofmore reliable data, may be deemed to be the proportion of the total income, profits or gains, of the companies, corresponding to the proportion which their Indian premium income bears to their total premium income.

On July 22, 1931, the appellant company made a return of its total income, profits or gains from its business in India, based on the year ending September 30, 1930, as the year of account, at a sum of £3,241 14*s.* 8*d.* Along with the return

a revenue account and balance sheet for that year was submitted. In the course of meetings with the Income-tax Officer, certain further information was submitted, which did not satisfy the latter, and, on December 1, 1931, he issued the assessment order which is now in question, by which he computed the income, profits or gains of the Indian business under rule 35 at the sum of £38,038, or Rs. 5,14,020. The company appealed against this assessment to the Assistant Commissioner of Income-tax, who confirmed the assessment, and they then requested the Commissioner of Income-tax to refer the matter to the High Court under section 66 (*2*) of the Act. The Commissioner took the view that the company's return had not been in the prescribed form, and that, accordingly they had failed to make a return, with the result that the assessment was made by the Income-tax Officer under sub-section (*4*) of section 23, and the appeal to the Assistant Commissioner was incompetent. Accordingly, as the matter was of importance, he made the reference on his own motion under section 66 (*1*). While the point does not directly concern the questions of law referred, their Lordships feel some doubt as to the Commissioner's view that the company had failed to make a return within the meaning of section 22 (*4*).

The two questions of law referred to the Court are as follows :—

"(1) Whether the Income-tax Officer, Companies Circle, Bombay, was justified in law in resorting to Rule 35 of the Income-tax Rules for the purpose of assessing the Company to income-tax for the year 1931-32 having regard to the data furnished by it to that Officer.

"(2) Whether the assessment of the Company to income-tax for the year 1931-32 is a legal assessment and binding upon it in view of the opinion expressed by this Honourable Court in Civil Reference No. 5 of 1928."

The first question involves the appellant company's challenge of the Income-tax Officer's right to have recourse to rule 35, while the second question concerns the validity of his application of the rule..

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The Income-tax Officer is only authorised to have recourse to the method of computation provided by rule 35 "in the absence of more reliable data". In the opinion of their Lordships, this requires (*a*) a scrutiny of the data which in fact had been made available to the Income-tax Officer, irrespective of any question as to the validity or correctness of the return made under section 22 (*1*), and (*b*) a consideration of the reliability of those data for the purpose of a proper computation of the income, profits or gains of the company in accordance with section 13 of the Act.

The appellant company maintains that the Income-tax Officer had more reliable data available (1) in the return made by the company and the revenue account and balance sheet of the Indian business which accompanied it, or, if that view was unsound, (2) in the said documents, supplemented by the triennial valuation report of the whole business for the triennial period ending on September 30, 1928, and the balance sheet and revenue account of the entire business for the year ended September 30, 1930, in both of which the average rate of interest earned by the invested funds of the company appears.

The method of computation under these contentions was as follows:—Under (1), the total premium income of the Indian business from non-participating policy-holders amounting to £90 for the year of account, and interest on investments in India and fees received in India to the amount of £3,151, making a total income of £3,241, no claim in fact being made for deduction of the small proportion of the expenses referable to that part of the business. Under (2) it was proposed to add a sum to represent what might be called the share of the Indian business in the interest earned by the total investments of the company held in Australia, by taking the proportion of that interest arrived at on the ratio borne by the total amount of the transfers from the Indian branches to the head office from their inception, shown in the revenue account and balance sheet of the Indian business as at

September 30, 1930, to the total of the company's investments at the same date in the company's balance sheet and revenue account, the interest being calculated at the average rate abovementioned.

The view taken by the Income-tax Officer, which was concurred in by the Assistant Commissioner, and is maintained in this case, was that in the case of a life insurance company, the only reliable data to arrive at its profits was by a valuation report, and he asked for a separate valuation report of the Indian business for a triennial period. The company declined to give this, but offered—though stating that they were under no obligation to do so—to send him a separate valuation of their Indian business as at September 30, 1930. A single valuation report as at the end of the year of account would obviously not have been sufficient for the ascertainment of profits; it would be necessary to have a valuation as at the *terminus a quo*, and this would be afforded either by a valuation as at September 30, 1929, or, in accordance with the practice of the company, a valuation for a triennial period, under which the ascertained profit might be divided equally between the three years. If a valuation report as at September 30, 1930, can be compiled, there can be no obstacle, as counsel for the company admitted, to the compilation of a similar valuation report as at an earlier date. A valuation report over a triennial period is clearly the more convenient course.

While Beaumont C. J. expressed himself as inclined to accept the contentions of the appellants as above stated, both the learned Judges decided the case adversely to the appellants on an argument submitted to them for the first time by the Advocate-General that income earned in Australia on monies remitted by the Indian branches and invested in Australia was liable to tax under section 42 of the Act. In their Lordships' opinion, any claim as to liability to tax under section 42 is a matter outside the letter of reference and is

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irrelevant to the questions submitted. It is an altogether different matter that, in making a valuation of the Indian business, it is necessary to consider the reserves held against the liability on the Indian policies, which in fact are held and invested by the head office. Their Lordships are not concerned in the present case with any possible liability of the company to tax under section 42, and they express no opinion on the matter.

In the opinion of their Lordships, the Income-tax Officer was entitled to take the view that the income, profits or gains of the Indian business could not properly be deduced from the data supplied by the company with the return. Only a small proportion of the premiums received could be said to represent income, profits or gains, and that would have to be taken on an average basis, as there will be losses on individual policies. As regards the appellants' second contention, their Lordships are of opinion that the Income-tax Officer rightly took the view that the information submitted by the appellants did not afford more reliable data for computation of the income, profits or gains of the Indian business than the method prescribed by rule 35, which is based on the total income, profits or gains of the company, the proportion attributable to the Indian business being calculated on the ratio of the Indian premium income to their total premium income. There can be no doubt that the total income, profits or gains of the company would fall to be computed on the basis of their triennial valuation reports, which, in their Lordships' opinion, is the most reliable method of computation in the case of a life insurance company. It is the method applied under rule 25 in the case of companies incorporated in India. The amount of interest earned on investments, though it is an element in the ascertainment of the income, profits or gains, is not by itself a reliable datum for such ascertainment.

Their Lordships are therefore of opinion that the Income-tax Officer was justified in resorting to rule 35.

Applying rule 35, the Income-tax Officer assessed the company as follows :—

	£	
(1) Premiums of the company as a whole for the year ended 30th September 1930	3,244,476	
(2) Premiums of the company in British India for the same period ..	87,942	
(3) Net assessable profit of the company as a whole based on the triennial investigations as at 30th September 1928	1,405,027	
Proportionately profit of British India	38,083	
or, at 1s. $5\frac{25}{32}$d. = Rs.	5,14,020	

As regards (1) and (2) if their Lordships assume without deciding that under section 35 in its application to the present case "premium income" should include the premiums received in respect of participating policies, it will still remain that as regards (3) the principle of *Style*'s case, (*supra*) has been altogether ignored.

The "total income, profits or gains, of the companies" referred to in rule 35 is the income, profits or gains as they would be ascertained for the purposes of the Act.

In the assessment order the following attempt is made to meet this manifest objection—apparently by showing that the figure of £ 1,405,027 being less than the average receipts (excluding premiums) for a year is not excessive :—

"According to the Bombay High Court decision the surplus profit arising out of contributions from the participating policy-holders is not liable to tax. From the valuation report of the Company as a whole for the triennium ended 30th September 1928, it will be seen that the income from sources other than participating and non-participating premiums is £ 4,404,140, i.e., average income for one year is £ 1,468,047 (about). The surplus for the year ended 30th September 1930, based on the above said triennial investigations as intimated is £ 1,405,027 which is less than the average

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income of £ 1,468,047. For the purposes of assessment, it is regarded that the expenditure incurred by the Company is first set off against the participating and non-participating premium income and the balance of expenditure against income from other sources. Thus the surplus is regarded as wholly out of income from other sources liable to tax."

This argument cannot be accepted: indeed it is quite inconsistent with the reasons for rejection of the appellants' two contentions on the first question. The Income-tax Officer has entirely ignored the non-participating premiums received, and, on the other hand, has included the whole amount of consideration received in respect of annuities. Further, he has deducted nothing in respect of the liabilities of the company, or for the expenses relative to the non-participating business. It is impossible to regard this figure as a proper ascertainment of the income, profits or gains of the company.

Their Lordships are therefore of opinion that the assessment was not a valid or legal assessment under rule 35.

Their Lordships, accordingly, are of opinion that the first question in the letter of reference should be answered in the affirmative, and that the second question should be answered in the negative. They will humbly advise His Majesty that the appeal should be allowed, that the judgment of the High Court should be set aside and that the questions should be answered as above stated. The respondent will pay to the appellants their costs of this appeal and in the Court in India.

Solicitors for the appellants: Messrs. *E. F. Turner & Sons.*

Solicitor for the respondent: *The Solicitor, India Office.*

C. S. S.