1958

Dau Dayal v. The State of Uttar Pradesh

Venkatarama Aiyar J.

the question which we have got to decide here, and on the language of s. 15 of the Act, which is what we are concerned with in this appeal, all that is required is that a private prosecutor should prefer his complaint within one year of the discovery of the offence, and if that is done, the bar under that section cannot apply. We agree with the decision of the learned Judges of the Court below that the proceedings are not barred by s. 15 of the Act.

This appeal is accordingly dismissed.

Appeal dismissed.

1958

November 24.

G. VENKATASWAMI NAIDU & CO.

v.

THE COMMISSIONER OF INCOME-TAX

(T. L. VENKATARAMA AIYAR, P. B. GAJENDRAGADKAR and A. K. SARKAR, JJ.)

Income Tax—Income from isolated transactions—"Adventure in the nature of trade"—Business income—Indian Income Tax Act, 1922 (XI of 1922), ss. 2(4), 10.

Reference to High Court—Transaction, whether or not an adventure in the nature of trade—Mixed question of law and fact—Indian Income-tax Act, 1922 (XI of 1922), s. 66(1).

The appellant, who was a firm acting as managing agents of a limited company (the Mills), purchased four plots of land adjoining the Mills on various dates between 1941 and 1942, and about five years later sold them to the Mills, as a result of which the appellant realised a sum of Rs. 43,887 in excess of the purchase price. For the assessment year 1948-49 the Income-tax Officer treated the amount as the income of the appellant and assessed it to income-tax under head 'business', on the ground that there was no evidence to show that the appellant had purchased the said lands for agricultural purposes or that they were acquired as an investment, and that since the lands were adjacent to the Mills the appellant must have purchased them solely with a view to sell them to the Mills with profit. He considered that the transaction had all the elements of a business transaction and was thus an adventure in the nature of trade within s. 2(4) of the Indian Income-tax Act, 1922. The Appellate Tribunal rejected the explanation given by the appellant regarding the object with which it had purchased the plots of land and agreed

with the view taken by the Income-tax Officer. At the instance of the appellant the Tribunal referred to the High Court the question: "whether there was material for the assessment of the sum of Rs. 43,887 being the difference between the purchase and sale price of the four plots of land as income from an adventure in the nature of trade." The High Court held that the transaction in question was an adventure in the nature of trade and so the income-tax authorities were justified in taxing the amount under the head 'business' for the relevant year. On appeal by special leave to the Supreme Court, it was contended for the appellant that on the facts and circumstances of the case it was erroneous in law to hold that the transaction in question was an adventure in the nature of trade. On the other hand, it was urged for the respondent that the question as raised before the High Court was one of fact not liable to be challenged under s. 66(1) of the Act.

Held, (1) that the expression "adventure in the nature of trade" in sub-s. (4) of s. 2 of the Indian Income-tax Act, 1922, postulates the existence of certain elements in the adventure which in law would invest it with the character of trade or business and that a tribunal while considering a question as to whether a transaction is or is not an adventure in the nature of trade, before arriving at its final conclusion on facts, has to address itself to the legal requirements associated with the concept of trade or business. Such a question is one of mixed law and fact and the decision of the tribunal thereon is open to consideration under s. 66(1) of the Act.

Meenakshi Mills, Madurai v. *Commissioner of Income-tax, Madras*, [1956] S.C.R. 691 and *Oriental Investment Co., Ltd.* v. *Commissioner of Income-tax, Bombay*, [1958] S.C.R. 49, relied on.

Edwards v. *Bairstow*, [1956] A.C. 14, considered and held not inconsistent with the abovesaid decisions.

(2) that in the circumstances of this case it would be more appropriate to frame the question in this from: "whether, on the facts and circumstances proved in the case, the inference that the transaction in question is an adventure in the nature of trade is in law justified."

Held, further, that even an isolated transaction might be regarded as an adventure in the nature of trade within s. 2(4) of the Act, if it is characterised by some of the essential features that make up trade or business.

Though judicial decisions which deal with the character of transactions alleged to be in the nature of trade do not purport to lay down any general or universal test, the presence of all the relevant circumstances mentioned by them may help the court to draw a similar inference, but it is not a matter of merely counting the number of facts and circumstances pro and con it is the total effect of all the relevant factors and circumstances that determine the distinctive character of the transactions.

1958

G. Venkataswami Naidu & Co. v. The Commissioner of Income-tax

If a person invests money in land intending to hold it, enjoys its income for some time, and then sells it at a profit, then it is a case of capital accretion and not profit derived from an adventure in the nature of trade. But where a purchase has been made solely and exclusively with the intention to resell at a profit and the purchaser had no intention of holding the property for himself or otherwise enjoying or using it, there would be a strong presumption that the transaction is an adventure in the nature of trade; but this may be rebutted by the other facts or circumstances of the case.

The Californian Copper Syndicate (Limited and Reduced) v. *Harris (Surveyor of Taxes)*, (1904) 5 Tax Cas. 159; *T. Beynon & Co., Ltd.* v. *Ogg*, (1918) 7 Tax Cas. 125; *Commissioners of Inland Revenue* v. *Livingston*, (1926) 11 Tax Cas. 538; *Martin* v. *Lowry*, (1926) 11 Tax Cas. 297; *Rutledge* v. *Commissioners of Inland Revenue*, (1929) 14 Tax Cas. 490; *Balgownie Land Trust, Ltd.* v. *The Commissioners of Inland Revenue*, (1929) 14 Tax Cas. 684; *F. A. Lindsay, A. E. Woodward and W. Hiscox* v. *Commissioners of Inland Revenue*, (1932) 18 Tax Cas. 43 and *Cayzer, Irvine and Co., Ltd.* v. *Commissioners of Inland Revenue*, (1942) 24 Tax Cas. 491, considered.

Commissioners of Inland Revenue v. *Reinhold*, (1953) 34 Tax Cas. 389, distinguished and considered as not laying down any general proposition of law.

In the present case, the circumstances showed that the appellant whose ordinary business was not to make investment in lands had purchased the plots of land with the sole intention of selling them to the Mills at a profit and this intention raised a strong presumption that the purchase and the subsequent sale were an adventure in the nature of trade; and, it was *held* that in the absence of any rebutting evidence, the Income-tax authorities were justified in taxing the amount in question as income from business.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 709 of 1957.

Appeal by special leave from the judgment and order dated April 18, 1955, of the Madras High Court in Case Referred No. 25 of 1952.

A. V. Viswanatha Sastri and *M. S. K. Sastri*, for the appellant.

M. C. Setalvad, Attorney-General for India, R. Ganapathy Iyer, R. H. Dhebar and *D. Gupta*, for the respondent.

1958. November 24. The Judgment of the Court was delivered by

GAJENDRAGADKAR, J.—The appellant is a firm acting as managing agents of the Janardana Mills Ltd., Coimbatore. It purchased four contiguous plots of land admeasuring 5 acres 26 cents under four sale deeds executed on October 25, 1941, November 15, 1941, June 29, 1942, and November 19, 1942, respectively for a total consideration of Rs. 8,712-15-6. After about five years these properties were sold by the appellant in two lots to the Janardana Mills Ltd. The first lot was sold on September 1, 1947, and the second on November 10, 1947, the total consideration for the two sales being Rs. 52,600. These two sales realised for the appellant a sum of Rs. 43,887-0-6 in excess of the purchase price.

The Income-tax Officer treated the said amount of Rs. 43,887 as the income of the appellant for the assessment year 1948-49, and assessed it to income-tax under the head "business". The officer held that there was no evidence to show that the appellant had purchased the said lands for agricultural purposes or that it had acquired them as an investment. He also found that, since the lands were adjacent to the Janardana Mills, the appellant must have purchased them solely with a view to sell them to the said mills with a profit. That is why, though the transaction was in the nature of a solitary transaction, it was held that it had all the elements of a business transaction and was thus an adventure in the nature of trade.

Against this order of assessment the appellant preferred an appeal to the Appellate Assistant Commissioner. The appellate authority upheld the appellant's contention that the amount in question was not assessable as it cannot be held to be income or profit resulting from a profit-making scheme, and set aside the order under appeal.

The respondent challenged the correctness of this order by taking an appeal against it to the Income-tax Appellate Tribunal. The tribunal agreed with the view taken by the Income-tax Officer and held that the amount in question was not a capital accretion but a gain made in an adventure in the nature of business

1958

G. Venkataswami Naidu & Co. v. The Commissioner of Income-tax

Gajendragadkar J.

in carrying out a scheme of profit-making. The tribunal rejected the explanations given by the appellant as to why it had purchased the properties and held that the purchase had been made by the appellant solely with a view to sell the said properties at profit to the Janardana Mills.

At the instance of the appellant the tribunal then referred to the High Court of Madras the question suggested by it in these words: "whether there was material for the assessment of the sum of Rs. 43,887 being the difference between the purchase and sale price of the four plots of land as income from an adventure in the nature of trade".

This reference was heard by Rajagopalan and Rajagopala Ayyangar, JJ., and the question referred has been answered against the appellant. The High Court has held that the transaction in question was an adventure in the nature of trade and so the respondent was justified in taxing the amount in question under the head "business" for the relevant year. The application for leave made by the appellant was rejected by the High Court. Thereupon the appellant applied for, and obtained, special leave to appeal to this Court. That is how the appeal has been admitted in this Court; and the only question which it raises for our decision is whether the High Court was right in holding that the transaction in question was an adventure in the nature of trade.

We may at this stage briefly indicate the material facts and circumstances found by the tribunal and the inference drawn by it in regard to the character of the transaction in question. The appellant purchased the four plots under four different sale deeds. The first purchase was for Rs. 521 and it covered a piece of land admeasuring 28¼ cents; the second purchase related to 2 acres 79½ cents and the price paid was Rs. 1,250; while the third and the fourth purchases were for Rs. 1,942 and Rs. 5,000 and they covered 28¼ cents and 1 acre and 90 cents respectively. The property purchased under the first sale deed was sold on November 10, 1947, for Rs. 2,825 whereas the three remaining properties were sold on September 1, 1947,

for Rs. 49,775, the purchaser in both cases being the Janardana Mills Ltd. The purchase of the first item of property by the appellant had been made in the name of Mr. V. G. Raja, assistant manager of the Janardana Mills Ltd., who is the son-in-law of G. Venkataswami Naidu, one of the partners of the appellant firm. Naturally when this property was sold to the mills the document was executed by the ostensible owner V. G. Raja. It is not disputed that the purchase in the name of V. G. Raja was benami for the appellant. All the plots which were thus purchased by the appellant piecemeal are contiguous and they adjoin the mills. On the plot purchased on June 29, 1942, there stood a house of six rooms which fetched an annual rent of about Rs. 100; and after deduction of taxes, it left a net income of Rs. 80 per year to the appellant. The other plots are vacant sites and they brought no income to the appellant. During the time that the appellant was in possession of these plots it made no effort to put up any structures on them or to cultivate them; and so it was clear that the only object with which the appellant had purchased these plots was to sell them to the mills at a profit. It was, however, urged by the appellant that the properties had been bought as an investment. This plea was rejected by the tribunal. The tribunal likewise rejected the appellant's case that it had purchased the plots for building tenements for the labourers working in the Janardana Mills. Alternatively it was urged by the appellant that the Janardana Mills decided to purchase the plots because an award passed by an industrial tribunal in June 1947 had recommended that the mills should provide tenements for its labourers. Thus the appellant's case was that it had not purchased the properties with a view to sell them to the mills and the mills in fact would not have purchased them but for the recommendation made by the award which made it necessary for the mills to purchase the adjoining plots for the purpose of building tenements for its employees. The tribunal was not impressed even by this plea; and so it ultimately held that the plots had been purchased by the appellant wholly and solely

1958

G. Venkataswami Naidu & Co.
v.
The Commissioner of Income-tax

Gajendragadkar J.

with the idea of selling them at profit to the mills. The tribunal thought that since the appellant was the managing agent of the mills it was in a position to influence the decision of the mills to purchase the properties from it and that was the sole basis for its initial purchase of the plots. On these findings the tribunal reached the conclusion that the sum of Rs. 43,887 was not a capital accretion but was a gain made in the adventure in the nature of business in carrying out the scheme of profit-making. The appellant contends that, on the facts and circumstances found in the case, it is erroneous in law to hold that the transaction in question is an adventure in the nature of trade.

There is no doubt that the jurisdiction conferred on the High Court by s. 66(1) is limited to entertaining references involving questions of law. If the point raised on reference relates to the construction of a document of title or to the interpretation of the relevant provisions of the statute, it is a pure question of law; and in dealing with it, though the High Court may have due regard for the view taken by the tribunal, its decision would not be fettered by the said view. It is free to adopt such construction of the document or the statute as appears to it reasonable. In some cases, the point sought to be raised on reference may turn out to be a pure question of fact; and if that be so, the finding of fact recorded by the tribunal must be regarded as conclusive in proceedings under s. 66(1). If, however, such a finding of fact is based on an inference drawn from primary evidentiary facts proved in the case, its correctness or validity is open to challenge in reference proceedings within narrow limits. The assessee or the revenue can contend that the inference has been drawn on considering inadmissible evidence or after excluding admissible and relevant evidence; and, if the High Court is satisfied that the inference is the result of improper admission or exclusion of evidence, it would be justified in examining the correctness of the conclusion. It may also be open to the party to challenge a conclusion of fact drawn by the tribunal on the ground that it is not supported by any legal evidence; or that the impugned conclusion drawn

from the relevant facts is not rationally possible; and if such a plea is established, the court may consider whether the conclusion in question is not perverse and should not, therefore, be set aside. It is within these narrow limits that the conclusions of fact recorded by the tribunal can be challenged under s. 66(1). Such conclusions can never be challenged on the ground that they are based on misappreciation of evidence. There is yet a third class of cases in which the assessee or the revenue may seek to challenge the correctness of the conclusion reached by the tribunal on the ground that it is a conclusion on a question of mixed law and fact. Such a conclusion is no doubt based upon the primary evidentiary facts, but its ultimate form is determined by the application of relevant legal principles. The need to apply the relevant legal principles tends to confer upon the final conclusion its character of a legal conclusion and that is why it is regarded as a conclusion on a question of mixed law and fact. In dealing with findings on questions of mixed law and fact the High Court would no doubt have to accept the findings of the tribunal on the primary questions of fact; but it is open to the High Court to examine whether the tribunal had applied the relevant legal principles correctly or not; and in that sense, the scope of enquiry and the extent of the jurisdiction of the High Court in dealing with such points is the same as in dealing with pure points of law.

This question has been exhaustively considered by this Court in *Meenakshi Mills, Madurai* v. *Commissioner of Income-tax, Madras* (1). In this case the appellate tribunal had come to the conclusion that certain sales entered in the books of the appellant company in the names of certain intermediaries, firms and companies, were fictitious and the profits ostensibly earned by them were in fact earned by the appellant which had itself sold the goods to the real purchasers and received the prices. On this finding the tribunal had ordered that the profits received from such sales should be added to the amount shown as profits in the appellant's books and should be taxed. The appellant

(1) [1956] S. C. R. 691.

1958

G. Venkataswami Naidu & Co.
v.
The Commissioner of Income-tax

Gajendragadkar J.

applied for a reference to the tribunal under s. 66(1) and the High Court of Madras under s. 66(2), but his application was rejected. Then it came to this Court by special leave under Art. 136 and it was urged on its behalf that the tribunal had erred in law in holding that the firms and companies described as the intermediaries were its benamidars and that its application for reference should have been allowed. This plea was rejected by this Court because it was held that the question of benami is purely a question of fact and not a mixed question of law and fact as it does not involve the application of any legal principles for its determination. In dealing with the argument urged by the appellant, this Court has fully considered the true legal position in regard to the limitation of the High Court's jurisdiction in entertaining references under s. 66(1) in the light of several judicial decisions bearing on the point. The ultimate decision of the Court on this part of the case was that "on principles established by authorities only such questions as relate to one or the other of the following matters can be questions of law under s. 66(1): (1) the construction of a statute or a document of title (2) the legal effect of the facts found where the point for determination is a mixed question of law and fact; and (3) a finding of fact unsupported by evidence or unreasonable and perverse in nature". Having regard to this legal position this Court held that the question of benami was a pure question of fact and it could not be agitated under s. 66(1).

The point about the scope and effect of the provisions of s. 66(1) has again been considered by this Court in *The Oriental Investment Co. Ltd.* v. *Commissioner of Income-tax, Bombay* (1). This was a case on the other side of the line. It was held that whether the appellant's business amounted to dealing in shares and properties or to investment is a mixed question of law and fact and that the legal effect of the facts found by the tribunal as a result of which the appellant could be treated as a dealer or investor is a question of law. As a result of this conclusion the appeal

(1) [1958] S. C. R. 49.

preferred by the appellant was allowed, the order passed by the High Court refusing the appellant's request for reference was set aside and the case was remitted to it for directing the tribunal to state a case on the two questions mentioned in the judgment. These two decisions bring out clearly the distinction between findings of fact and findings of mixed questions of law and fact.

What then is the nature of the question raised before us in the present appeal? The tribunal and the High Court have found that the transaction in question is an adventure in the nature of trade; and it is the correctness of this view that is challenged in the present appeal. The expression "adventure in the nature of trade" is used by the Act in s. 2, sub-s. (4) which defines business as including any trade, commerce or manufacture, or any adventure or concern in the nature of trade, commerce or manufacture. Under s. 10, tax shall be payable by an assessee under the head profits and gains of business, profession or vocation in respect of the profit or gains of any business, profession or vocation carried on by him. Thus the appellant would be liable to pay the tax on the relevant amount if it is held that the transaction which brought him this amount was business within the meaning of s. 2, sub-s. (4) and it can be said to be business of the appellant if it is held that it is an adventure in the nature of trade. In other words, in reaching the conclusion that the transaction is an adventure in the nature of trade, the tribunal has to find primary evidentiary facts and then apply the legal principles involved in the expression "adventure in the nature of trade" used by s. 2, sub-s. (4). It is patent that the clause "in the nature of trade" postulates the existence of certain elements in the adventure which in law would invest it with the character of a trade or business; and that would make the question and its decision one of mixed law and fact. This view has been incidentally expressed by this Court in the case of *Meenakshi Mills, Madurai* (1) in repelling the appellant's argument based on the decision of the

(1) [1956] S. C. R. 691.

1958

G Venkataswami Naidu & Co.
v.
The Commissioner of Income-tax

Gajendragadkar J.

House of Lords in *Edwards* v. *Bairstow* (1). For the respondent, the learned Attorney-General has, however, relied on the fact that the relevant observations in the case of *Meenakshi Mills, Madurai*, are *obiter* and he has invited our attention to the decision in the case of *Edwards* (1) in support of his contention that the judgment of the House of Lords would show that the question about the character of the transaction was ultimately treated as a question of fact. Before we refer to the said decision it may be relevant to observe that there are two ways in which the question may be approached. Even if the conclusion of the tribunal about the character of the transaction is treated as a conclusion on a question of fact, it cannot be ignored that, in arriving at its final conclusion on facts proved, the tribunal has undoubtedly to address itself to the legal requirements associated with the concept of trade or business. Without taking into account such relevant legal principles it would not be possible to decide whether the transaction in question is or is not in the nature of trade. If that be so, the final conclusion of the tribunal can be challenged on the ground that the relevant legal principles have been misapplied by the tribunal in reaching its decision on the point; and such a challenge would be open under s. 66(1) because it is a challenge on a ground of law. The same result is achieved from another point of view and that is to treat the final conclusion as one on a mixed question of law and fact. On this view the conclusion is not treated as one on a pure question of fact, and its validity is allowed to be impeached on the ground that it has been based on a misapplication of the true legal principles. It would thus be seen that whether we call the conclusion in question as one of fact or as one on a question of mixed law and fact, the application of legal principles which is an essential part in the process of reaching the said conclusion is undoubtedly a matter of law and if there has been an error in the application of the said principles it can be challenged as an error of law. The difference then is merely one of form and not substance; and on the whole it is

(1) [1956] A. C. 14; 36 Tax Cas 207.

more convenient to describe the question involved as a mixed question of law and fact. That is the view expressed by this Court in the case of *Meenakshi Mills, Madurai* (1); and, in our opinion, it avoids any confusion of thought and simplifies the position by treating such questions as analogous to those falling under the category of questions of law.

Let us then consider whether the decision of the House of Lords in the case of *Edwards* (2) is inconsistent with this view. In this case the respondents, who were respectively a director of a leather manufacturing company and an employee of a spinning firm, purchased a complete cotton spinning plant in 1946 with the object of selling it as quickly as possible at a profit. They hoped to sell the plant in one lot, but ultimately had to dispose of it in five separate lots over the period from November 1946 to February 1948. Assessments to income-tax in respect of profits arising from this transaction were made under Case I of Schedule D for the years 1946-47 and 1947-48. On the matter being taken before the Chancery Division, it was held in accordance with the earlier decisions of the Court of Appeal in *Cooper* v. *Stubbs* (3) and *Leeming* v. *Jones* (4) that the finding of the General Commissioners was a finding of fact which could not be challenged in appeal. The attention of the court was drawn to the different view expressed in a Scottish case, *Commissioners of Inland Revenue* v. *Fraser* (5) where the Court of Session had held that it was at liberty to treat the matter as a mixed question of fact and law, and in fact it had overruled the finding of the General Commissioners in that behalf. "It does not seem to me", observed Upjohn, J., "that in this court I am at liberty to follow the practice of the Scottish Court, attractive though it would be to do so, if the matter was *res integra*". However, since apparently the finding of the General Commissioners did not appear to the court to be satisfactory, the matter was remitted to them with an intimation that they should consider

(1) [1956] S.C.R. 691. (2) [1956] A.C. 14; 36 Tax Cas. 207.
(3) (1925) 10 Tax Cas. 29. (4) (1930) 15 Tax Cas. 333.
(5) (1942) 24 Tax Cas. 498.

1958

G. Venkataswami Naidu & Co. v. The Commissioner of Income-tax

Gajendragadkar J.

the question whether the transaction, being an isolated transaction, there was nevertheless an adventure in the nature of trade which was assessable to tax under Case I of Schedule D. The Commissioners were directed to hear further arguments on this point before stating a supplementary case. After remand, the Commissioners adhered to their earlier view and stated that they were of opinion that the transaction was an isolated case and not taxable and so they discharged the assessments. With the statement of this supplementary case, the matter was argued before the Chancery Division again. Wynn-Parry, J., who delivered the judgment on this occasion referred to the earlier decisions of the Court of Appeal and held that "on those authorities prima facie the matter is concluded by the decision of the Commissioners that the transaction, the subject-matter of the case, was not an adventure in the nature of trade'. Then the learned judge examined the question as to whether the decision of the Commissioners can be said to be perverse; and held that it could not be so characterised. In the result the appeal was dismissed. The question then reached the Court of Appeal but the result was the same. The Court of Appeal observed that the earlier decisions were binding on it no less than the Court of First Instance; and so it held that the conclusion of the Commissioners was a finding of fact which the court cannot disturb. However, it is apparent from the discussion that took place when the court granted leave to the Crown to take the matter to the House of Lords that the court did not feel happy about the correctness of the finding made by the General Commissioners in the case. That is how the matter reached the House of Lords.

The facts in this case were so clearly against the finding of the Commissioners that Viscount Simonds made it clear at the outset that in his opinion, "whatever test is adopted, that is, whether the finding that the transaction was not an adventure in the nature of trade is to be regarded as a pure finding of fact or as the determination of the question of law or of mixed law and fact, the same result would be reached in this

case. The determination cannot stand. This appeal must be allowed and the assessments must be confirmed". It is in the light of this emphatic statement that the rest of the judgment of Viscount Simonds must be considered. He referred to the divergence of views expressed in English and Scottish decisions and his conclusion was that "if and so far as there is any divergence between the English and Scottish approach, it is the former which is supported by the previous authority of this House to which reference has been made"; but he analysed the position involved in both the approaches and held that the difference between them was not of substance. "To say that a transaction is or is not an adventure in the nature of trade", observed Viscount Simonds, "is to say that it has or has not the characteristics which distinguish such an adventure, but it is a question of law not of fact what are those characteristics, or, in other words, what the statutory language means. It follows that the inference can only be regarded as an inference of fact if it is assumed that the Tribunal which makes it is rightly directed in law what the characteristics are and that, I think, is the assumption that is made". Dealing with the merits of the case, Viscount Simonds observed that "sometimes, as in the case as it now comes before the Court where all the admitted or found facts point one way and the inference is the other way, it can only be a matter of conjecture why that inference has been made. In such a case it is easy either to say that the Commissioners have made a wrong inference of fact because they have misdirected themselves in law or to take a short-cut and say that they have made a wrong inference of law, and I venture to doubt whether there is more than this in the divergence between the two jurisdictions which has so much agitated the Revenue authorities". Lord Radcliffe substantially agreed with this view. He also referred to the divergence of views expressed in Scottish and English decisions and observed that "the true position of the Court in all these cases can be shortly stated. If a party to a hearing before the Commissioners expresses dissatisfaction with their determination

1958

G. Venhataswami Naidu & Co. v. The Commissioner of Income-tax

Gajendragadkar J.

as being erroneous in point of law, it is for them to state a case and in the body of it to set out the facts that they have found as well as their determination. I do not think that inferences drawn from other facts are incapable of themselves being findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. When the case comes before the Court, it is its duty to examine the determination having regard to its knowledge of the relevant law. If a case contains anything *ex facie* which is bad in point of law and which bears upon the determination, it is obviously, erroneous in point of law. But, without any such misconception appearing *ex facie*, it may be that the facts found are such that no persons acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the Court must intervene". Lord Radcliffe remarked that the English courts had been led to be rather overready to treat these questions as pure questions of fact and added "if so I would say with very great respect that I think it a pity that such a tendency should persist". Therefore, it seems to us that in effect this decision is not inconsistent with the view we have taken about the character of the question raised before us in the present appeal. As we have already indicated, to avoid confusion or unnecessary complications it would be safer and more convenient to describe the question about the character of the transaction in the context as a question of mixed law and fact.

The learned Attorney-General has invited our attention to the fact that the form in which the question referred to the High Court has been framed in the present case seems to assume that the impugned finding is a finding of fact. It is only in regard to a finding of fact that a question can be properly framed as to whether there was material to support the said finding. We would, therefore, like to add that it would be more appropriate to frame the question in this form: whether, on the facts and circumstances proved in the case, the inference that the transaction in

question is an adventure in the nature of trade is in law justified ? In substance, that is the basis on which the question has been framed by the respondent and considered by the High Court.

This question has been the subject-matter of several judicial decisions; and in dealing with it all the judges appear to be agreed that no principle can be evolved which would govern the decision of all cases in which the character of the impugned transaction falls to be considered. When s. 2, sub-s. (4), refers to an adventure in the nature of trade it clearly suggests that the transaction cannot properly be regarded as trade or business. It is allied to transactions that constitute trade or business but may not be trade or business itself. It is characterised by some of the essential features that make up trade or business but not by all of them; and so, even an isolated transaction can satisfy the description of an adventure in the nature of trade. Sometimes it is said that a single plunge in the waters of trade may partake of the character of an adventure in the nature of trade. This statement may be true; but in its application due regard must be shown to the requirement that the single plunge must be in the waters of trade. In other words, at least some of the essential features of trade must be present in the isolated or single transaction. On the other hand, it is sometimes said that the appearance of one swallow does not make a summer. This may be true if, in the metaphor, summer represents trade; but it may not be true if summer represents an adventure in the nature of trade because, when the section refers to an adventure in the nature of trade, it is obviously referring to transactions which individually cannot themselves be described as trade or business but are essentially of such a similar character that they are treated as in the nature of trade. It was faintly argued for the appellant that it would be difficult to regard a single or an isolated transaction as one in the nature of trade because income resulting from it would inevitably lack the characteristics attributed to it by Sir George Lowndes in *Commissioner of I. T.* v. *Shaw Wallace and Company* [1]. "Income their Lordships

(1) (1932) L. R. 59 I.A. 206.

1958

G. Venkataswami Naidu & Co. v. The Commissioner of Income-tax

Gajendragadkar J.

think", observed Sir George Lowndes, "in this Act connotes a periodical monetary return coming in with some sort of regularity or expected regularity from definite sources". Then the learned judge proceeded to observe that "income has been likened pictorially to the fruit of a tree, or the crop of a field. It is essentially the produce of something which is often loosely spoken of as capital". In our opinion, it would be unreasonable to apply the test involved in the use of this pictorial language to the decision of the question as to whether a single or an isolated transaction can be regarded as an adventure in the nature of trade. In this connection we may, with respect, refer to the comment made by Lord Wright in *Raja Bahadur Kamakshya Narain Singh of Ramgarh* v. *Commissioner of I. T., Bihar and Orissa* (1) that "it is clear that such picturesque similes cannot be used to limit the true character of income in general". We are inclined to think that, in dealing with the very prosaic and sometimes complex questions arising under the Income-tax Act, use of metaphors, however poetic and picturesque, may not help to clarify the position but may instead introduce an unnecessary element of confusion or doubt.

As we have already observed it is impossible to evolve any formula which can be applied in determining the character of isolated transactions which come before the courts in tax proceedings. It would besides be inexpedient to make any attempt to evolve such a rule or formula. Generally speaking, it would not be difficult to decide whether a given transaction is an adventure in the nature of trade or not. It is the cases on the border line that cause difficulty. If a person invests money in land intending to hold it, enjoys its income for some time, and then sells it at a profit, it would be a clear case of capital accretion and not profit derived from an adventure in the nature of trade. Cases of realisation of investments consisting of purchase and resale, though profitable, are clearly outside the domain of adventures in the nature of trade. In deciding

(1) (1943) L.R. 70 I.A. 180, 193.

the character of such transactions several factors are treated as relevant. Was the purchaser a trader and were the purchase of the commodity and its resale allied to his usual trade or business or incidental to it? Affirmative answers to these questions may furnish relevant data for determining the character of the transaction. What is the nature of the commodity purchased and resold and in what quantity was it purchased and resold? If the commodity purchased is generally the subject-matter of trade, and if it is purchased in very large quantities, it would tend to eliminate the possibility of investment for personal use, possession or enjoyment. Did the purchaser by any act subsequent to the purchase improve the quality of the commodity purchased and thereby made it more readily resaleable? What were the incidents associated with the purchase and resale? Were they similar to the operations usually associated with trade or business? Are the transactions of purchase and sale repeated? In regard to the purchase of the commodity and its subsequent possession by the purchaser, does the element of pride of possession come into the picture? A person may purchase a piece of art, hold it for some time and if a profitable offer is received may sell it. During the time that the purchaser had its possession he may be able to claim pride of possession and aesthetic satisfaction; and if such a claim is upheld that would be a factor against the contention that the transaction is in the nature of trade. These and other considerations are set out and discussed in judicial decisions which deal with the character of transactions alleged to be in the nature of trade. In considering these decisions it would be necessary to remember that they do not purport to lay down any general or universal test. The presence of all the relevant circumstances mentioned in any of them may help the court to draw a similar inference; but it is not a matter of merely counting the number of facts and circumstances pro and con; what is important to consider is their distinctive character. In each case, it is the total effect of all relevant factors and circumstances that determines the character of the

1958

G. Venkataswami Naidu & Co.
v.
The Commissioner of Income-tax

Gajendragadkar J.

transaction; and so, though we may attempt to derive some assistance from decisions bearing on this point, we cannot seek to deduce any rule from them and mechanically apply it to the facts before us.

In this connection it would be relevant to refer to another test which is sometimes applied in determining the character of the transaction. Was the purchase made with the intention to resell it at a profit? It is often said that a transaction of purchase followed by resale can either be an investment or an adventure in the nature of trade. There is no middle course and no half-way house. This statement may be broadly true; and so some judicial decisions apply the test of the initial intention to resell in distinguishing adventures in the nature of trade from transactions of investment. Even in the application of this test distinction will have to be made between initial intention to resell at a profit which is present but not dominant or sole; in other words, cases do often arise where the purchaser may be willing and may intend to sell the property purchased at profit, but he would also intend and be willing to hold and enjoy it if a really high price is not offered. The intention to resell may in such cases be coupled with the intention to hold the property. Cases may, however, arise where the purchase has been made solely and exclusively with the intention to resell at a profit and the purchaser has no intention of holding the property for himself or otherwise enjoying or using it. The presence of such an intention is no doubt a relevant factor and unless it is offset by the presence of other factors it would raise a strong presumption that the transaction is an adventure in the nature of trade. Even so, the presumption is not conclusive; and it is conceivable that, on considering all the facts and circumstances in the case, the court may, despite the said initial intention, be inclined to hold that the transaction was not an adventure in the nature of trade. We thus come back to the same position and that is that the decision about the character of a transaction in the context cannot be based solely on the application of any abstract rule, principle or test and

must in every case depend upon all the relevant facts and circumstances.

Let us now consider some of the decisions to which our attention was invited. Normally the purchase of land represents investment of money in land; but where a company is formed for the purpose inter alia of acquiring and reselling mining property, and after acquiring and working various property, it resells the whole to a second company receiving payment in fully-paid shares of latter company, it was held in *The Californian Copper Syndicate (Limited and Reduced)* v. *Harris (Surveyor of Taxes)* (1) that the difference between the purchase price and the value of the shares for which the property was exchanged is a profit assessable to income-tax. In this case Lord Justice Clerk has observed that "it is quite a well settled principle in dealing with the question of assessment of Income Tax, that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act"; and he added that "it is equally well established that the enhanced value obtained from realisation or conversion of security may be so assessable where what is done is not merely a realisation or a change of investment but an act done in what is truly the carrying on or carrying out of a business". This was a clear case where the company was held to be carrying on the business of purchase and sale of mining property.

Where land purchased, and subsequently developed, with the object of making it more readily saleable, was sold at a profit, the intention of the assessee was treated to be not to hold the land as an investment, but as a trading asset in *Cayzer, Irvine and Co. Ltd.* v. *Commissioners of Inland Revenue* (2). In his judgment, Lord President Normand referred to the large development expenditure incurred by the assessee to improve the property and observed that it appeared to be on the whole consistent with the idea that it was carrying on a trade in land rather than with the idea that

(1) (1904) 5 Tax Cas. 159.
(2) (1942) 24 Tax Cas. 491.

1958

G. Venkataswami Naidu & Co.
v.
The Commissioner of Income-tax

Gajendragadkar J.

it was throughout holding it as an investment only to be realised if at all when it desired to meet some financial need. In repelling the plea that the transaction showed investment, the Lord President added that the Commissioners " with their knowledge and experience of these matters, have come to the conclusion that the intention was to hold this estate not as an investment but as a trading asset and in order to develop it and to market it ". It would thus appear that the conduct of the assessee in incurring a large amount of expenditure on the development of land consisting mainly in the construction of roads and sewers was held to justify the inference that the transaction was an adventure in the nature of trade, though the property purchased and sold was land.

In the *Commissioners of Inland Revenue* v. *Livingston* (1) the assessees respondents were a ship repairer, a blacksmith and a fish salesmen's employee; they purchased as a joint venture a cargo vessel with a view to converting it into a steam-drifter and selling it. They were not connected in business and they had never previously bought a ship. After the ship was purchased, extensive repairs and alterations were carried out by the orders of the respondents and the ship was then sold at a profit. It was held that the profit arising from the transaction was assessable to income-tax under Case I of Schedule D. Lord President Clyde said that in deciding whether the profits in question were taxable, regard must be had to the character and circumstances of the particular venture. " If the venture was one consisting simply in an isolated purchase of some article against an expected rise in price and a subsequent sale ", observed the Lord President, " it might be impossible to say that the venture was in the nature of trade ". According to him the test to be applied would be whether the operations involved in the transaction are of the same kind and carried on in the same way as those which are characteristic of ordinary trading in the line of business in which the venture was made. If they are, there was no reason why the venture should not be

(1) (1926) 11 Tax Cas. 538.

regarded as in the nature of trade merely because it was a single venture which took only three months to complete. Reference was then made to the steps taken by the assessees to buy a secondhand vessel and to convert into a marketable drifter; and it was stated that the profit made by the venture arose not from the mere appreciation of the capital value of an isolated purchase for resale but from the expenditure on the subject purchased of money laid out upon it for the purpose of making it marketable at a profit. "That", said the Lord President, "was the very essence of trade". It was in this connection that the Lord President observed that the appearance of a single swallow does not make a summer. It would thus be noticed that this decision was based substantially on the ground that after the ship was purchased the assessees bestowed labour and money on converting it into a marketable drifter and that imprinted upon the transaction the character of trade. It is true that some of the observations made by the Lord President would indicate that from the intention to resell at a profit it would be impossible to attribute to the transaction the character of an adventure in the nature of trade. However, as we will presently point out, these observations have been explained by the Lord President himself subsequently in *Rutledge* v. *Commissioners of Inland Revenue* (1); and it is to this case that we will now refer.

In the case of *Rutledge* (1) the appellant was a moneylender who was also interested in a cinema company in 1920. Since that time he had been interested in various businesses. He was in Berlin in 1920 on business connected with the cinema company where he was offered an opportunity of purchasing very cheaply a large quantity of paper. He effected the purchase and within a short time after his return to England he sold the whole consignment to one person at a considerable profit. This profit was held liable to assessment to income-tax, Schedule D, and to excess profits duty as being profit of an adventure in the nature of trade. This assessment was the subject-matter

(1) (1929) 14 Tax Cas. 490.

1958

G. Venkataswami Naidu & Co.
v.
The Commissioner of Income-tax

Gajendragadkar J.

of an appeal before the Court of Appeal, and on behalf of the appellant the observations made by the Lord President Clyde in the case of *Livingston* (1) were pressed into service; but the Lord President did not accept the plea based on his earlier observations because he said that the said observations were intended to show that a single transaction fell far short of constituting a dealer's trade; whereas, in the present case, the question was whether the transaction was an adventure in the nature of trade. The Lord President agreed that mere intention is not enough to invest a transaction with the character of trade but he added that, if the purchase is made for no purpose except that of resale at a profit, there seems little difficulty in arriving at the conclusion that the deal was in the nature of trade though it may be wholly insufficient to constitute by itself a trade. Then he referred to the illustration which he had cited in his earlier decision about the purchase of a picture and observed that if a picture was purchased to embellish the purchaser's own house for a time, he might sell it if the anticipated appreciation in the value ultimately realised itself. "In such a case", says the Lord President, "I pointed out that it *might* be impossible to affirm that the purchase and sale constituted an adventure in the nature of trade although, again, the crisis of judgment might turn on the particular circumstances". It would thus be clear that the strong observations made by the Lord President in the case of *Livingston* (1) must be considered in the light of the clarification made by him in this case. Lord Sands, who agreed with the Lord President has thus observed: "Your Lordship in the Chair has indicated that there may be cases of purchase and resale at a profit where the transaction cannot be said to be in the nature of trade. In particular, this may be the case where there is no definite intention of reselling when the purchase is made". This decision, therefore, shows that where the assessee purchased a very large quantity of paper with the intention to sell it at profit the transaction was treated as an adventure in the nature of trade. It was held

(1) (1926) 11 Tax Cas. 538.

to be a most successful adventure on the part of the assessee and having regard to the circumstances attending the purchase and sale it was treated as an adventure in the nature of trade.

In *T. Beynon & Co. Ltd.* v. *Ogg* (1) the court was dealing with the case of a company which was carrying on business as coal merchants, ship and insurance brokers and as sole selling agent for various colliery companies in which latter capacity it was a part of its duty to purchase wagons on its own account as a speculation and subsequently to dispose of them at a profit. The assessee contended that the transaction of purchase and sale being an isolated one the profit was in the nature of a capital profit on the sale of an investment and should be excluded in computing its liability to income-tax. The court held that the profit realised was made in the operation of the company's business and was properly included in the computation of company's profits for assessment under Schedule D. It appears that, in 1914, acting as agent on behalf of two colliery companies, the assessee had purchased two lots of wagons each of which consisted of 250 wagons. During the course of negotiations the assessee, foreseeing that the cost of material and wages was likely to increase, determined to buy a third lot of 250 wagons for itself and did eventually purchase it. In July 1915 the assessee sold this lot and made a profit of £ 2,500. The question which arose for decision was whether this sum was chargeable to income-tax. In dealing with the argument that as an isolated transaction the profit arising out of it was not chargeable to tax, Sankey, J., observed that he thought "in most cases an insolated transaction does not fall to be chargeable". But he added "you have to consider the transaction and you cannot lay it down as a matter of law without regard to the circumstances that in this case the £ 2,500 is not chargeable". Then the learned judge considered that the number of wagons purchased was large and held that the other circumstances attending the purchase and sale of the said wagons showed that "this transaction was a

(1) (1918) 7 Tax Cas. 125.

1958

G. Venkataswami Naidu & Co.
v.
The Commissioner of Income-tax

Gajendragadkar J.

transaction, and this profit was a profit" with the result that it made the operation of the assessee in that behalf its business. The learned judge, however, added a word of caution that he did not think it desirable to lay down any rule as to where the line ought to be drawn, and that it was not even possible to lay down such a rule. "But", said the learned judge, "it is perfectly easy to say whether Case A or Case B falls on the one side or the other".

In the *Balgownie Land Trust, Ltd.* v. *The Commissmissioners of Inland Revenue* (1) the owner of a landed estate, at his death, had left his estate to trustees with a direction to realise. The trustees were not successful in their efforts to sell the estate in the market. So they formed a company with general powers to deal in real property and transferred the estate to this company in exchange for shares which were allotted to the beneficiaries under the trust and were at the date of the appeal still mainly held by those beneficiaries or their representatives. Soon after its incorporation the purchaser company made a substantial purchase of some other property acquired by borrowing on the security of the original estate. The company received rents and paid a regular dividend on its capital. In 1921 and the following years parts of the original estate were sold and in 1925 the whole of the additional property was sold. When the profits realised by the sales were taxed under Schedule D for the year 1926-27, the assessee contended that the transactions in question were not in the nature of trade and the profits arising therefrom cannot be taxed. This contention was negatived by the General Commissioners whereupon the assessee appealed. Lord President Clyde described the problem raised by the assessee as one of the most familiar problems under Case I of Schedule D and observed that "a single plunge may be enough provided it is shown to the satisfaction of the Court that the plunge is made in the waters of trade; but the sale of a piece of property—if that is all that is involved in the plunge—may easily fall short of anything in the nature of trade. Transactions of sale are characteristic

(1) (1929) 14 Tax Cas. 684.

of trade, but they are not necessarily distinctive of it; much depends on the circumstances". Then the conduct of the assessee after its incorporation was considered and it was held that the purchase of the property in substance amounted to a launching forth *albeit* not in a very large scale. In the result the finding of the Commissioners was confirmed and the profit was held liable to tax.

In *Martin* v. *Lowry* (1) the House of Lords was considering a case of a wholesale agricultural machinery merchant who had never had any connection with the linen trade purchasing from the government the whole of its surplus stock of aeroplane linen (some 44 million yards) at a fixed price per yard. The contract of purchase provided in detail as to delivery, and the payment of the price. The purchaser failed in his original attempt to sell the whole of the linen to Belfast linen manufacturers outright. Then he sought to bring pressure on them by placing the linen for sale to the public. It led to an extensive advertising campaign, renting of offices and engaging advertising manager, a linen expert as adviser and a staff of clerks. Sales then proceeded rapidly and soon the whole stocks were disposed of. In all 4,279 orders were received from 1,280 purchasers. Assessment to income-tax and excess profits duty were made upon the assessee in respect of profits of the transaction. It was held that the dealings of the assessee in linen constituted the carrying on of a trade of which the profits were chargeable to income-tax and excess profits duty. One of the points raised before the House of Lords was that the assessee did not carry on trade or business but only engaged in a single adventure not involving trading operation. In rejecting this contention, Viscount Cave, L. C., observed that "the Commissioners have found as a fact that he did carry on trade, and they set out in the Case ample material upon which they could come to that conclusion". He added that, indeed, having regard to the methods adopted for the resale of the linen, to the number of operations into which the assessee entered and to the time occupied by

(1) [1926] 11 Tax Cas. 297.

1958

G. Venkataswami Naidu & Co. v. The Commissioner of Income-tax

Gajendragadkar J.

the resale, he did not himself see how they could have come to any other conclusion. The other point raised in the appeal was that the profits in question did not come within the description of annual profits or gains but we are not concerned with that point.

In *F. A. Lindsay, A. E. Woodward and W. Hiscox* v. *Commissioners of Inland Revenue* (1) the appellant L, a wine merchant, had on hand a large quantity of American rye whisky. He invited the appellants W & H who were also engaged in the wine trade to join with him in a venture of shipping the whisky to the United States. It was agreed that W & H should contribute certain sums towards expenses and that the profits should be shared in certain proportions. The agreement was not reduced to writing. The shipping of the whisky was arranged by L with consultation with W & H and was carried out gradually over a period of two years. From time to time W & H met L who told them that the whisky had been successfully shipped to the United States and sold there profitably. Subsequently the appellants decided to discontinue the export of whisky and to employ the monies which they had accumulated in the purchase with a view to resale of a wine business in Portugal. In respect of the profits made by the appellants from the sale of wine an assessment was made on them jointly for 1922-23. The Special Commissioners found that a partnership or joint venture subsisted between the appellants and that the profits of the sales of whisky were assessable to income-tax. The Lord President Clyde rejected the appellant's contention and observed that " the nature of the transaction—apart from the fradulent breaches of law which were inherent in it—was neither more nor less than the commercial disposal of a quantity of rye whisky ". In point of fact the disposal was not effected by a single transaction but extended over a year and more; and so it could not fall outside the sphere of trade. This was a clear case where a large number of distinctive features of trade were associated with the transaction.

(1) (1932) 18 Tax Cas. 43.

The transaction of the purchase and sale of whisky was again brought before the court for its decision in the *Commissioners of Inland Revenue* v. *Fraser* (1). In this case the assessee, a woodcutter, bought through an agent for resale whisky in bond for £ 407. Nearly three years thereafter the whisky was sold at a profit for £ 1,131. This was the assessee's sole dealing in whisky. He had no special knowledge of the trade and he did not take delivery of the whisky nor did he have it blended and advertised. Even so, it was held that the transaction was an adventure in the nature of trade. It may be mentioned that when the matter was first taken before the Commissioners they took the view that an adventure in the nature of trade had not been carried on by the assessee, that merely an investment had been made and subsequently realised and so the profit was not assessable to income-tax. This view was, however, reversed by the First Division of the Court of Session and it was held that in coming to the conclusion the Commissioners had misdirected themselves as to the meaning of "being engaged in an adventure in the nature of trade". The Lord President Normand conceded that it would be extremely difficult to hold that a single transaction amounted to a trade but he added that it may be much less difficult to hold that a single transaction was an adventure in the nature of trade. "There was much discussion", observed the Lord President, "as to the criterion which the court should apply. I doubt if it would be possible to formulate a single criterion." The following observations made by the Lord President in this connection may be usefully quoted:

"It is in general more easy to hold that a single transaction entered into by an individual in the line of his own trade (although not part and parcel of his ordinary business) is an adventure in the nature of trade than to hold that a transaction entered into by an individual outside the line of his own trade or occupation is an adventure in the nature of trade.

(1) (1942) 24 Tax Cas. 498.

1958

G. Venkataswami Naidu & Co. v. The Commissioner of Income-tax

Gajendragadkar J.

But what is a good deal more important is the nature of the transaction with reference to the commodity dealt in. The individual who enters into a purchase of an article or commodity may have in view the resale of it at a profit, and yet it may be that that is not the only purpose for which he purchased the article or the commodity, nor the only purpose to which he might turn it if favourable opportunity of sale does not occur. In some of the cases the purchase of a picture has been given as an illustration. An amateur may purchase a picture with a view to its resale at a profit, and yet he may recognise at the time or afterwards that the possession of the picture will give him aesthetic enjoyment if he is unable ultimately, or at his chosen time, to realise it at a profit. A man may purchase stocks and shares with a view to selling them at an early date at a profit, but, if he does so, he is purchasing something which is itself an investment, a potential source of revenue to him while he holds it. A man may purchase land with a view to realising it at a profit, but it also may yield him an income while he continues to hold it. If he continues to hold it, there may be also a certain pride of possession. But the purchaser of a large quantity of a commodity like whisky, greatly in excess of what could be used by himself, his family and friends, a commodity which yields no pride of possession, which cannot be turned to account except by a process of realisation, I can scarcely consider to be other than an adventurer in a transaction in the nature of a trade; and I can find no single fact among those stated by the Commissioners which in any way traverses that view. In my opinion the fact that the transaction was not in the way of business (whatever it was) of the Respondent in no way alters the character which almost necessarily belongs to a transaction like this. Most important of all, the actual dealings of the Respondent with the whisky were exactly of the kind that take place in ordinary trade."

These observations indicate some of the important considerations which are to be borne in mind in determining the character of a single transaction.

We may now refer to the decision of the House of Lords in *Leeming* v. *Jones* (1). In this case the appellant was a member of a syndicate of four persons formed to acquire an option over a rubber estate with a view to resell it at a profit. The option was secured but the estate was considered too small for a resale to a company for public floatation. An option over another adjoining estate was accordingly secured and it was decided to resell the two estates to a public company to be formed for the purpose. Another member of the syndicate undertook to arrange for the promotion of this company. The syndicate's total receipts resulting from the transactions in respect of the estates amounted to £ 3,000 and the balance remaining, after deduction of certain expenses, was divided between the members. The appellant was assessed to income-tax, Schedule D, in respect of his share. The General Commissioners held that the appellant acquired the property or interest in the property in question with the sole object of turning it over again at a profit and that he at no time had any intention of holding it as an investment. That is why they confirmed the assessment. After the case was heard before the King's Bench Division it was remitted to the General Commissioners for a finding as to whether there was or was not a concern in the nature of trade. The Commissioners then found that the transaction in question was not a concern in the nature of trade and that there was no liability to assessment. It may be pointed out that in remitting the case for the reconsideration of the General Commissioners, Rowlatt, J., had observed that it was quite clear that what the Commissioners had got to find was whether there was a concern in the nature of trade and all that they had found was that the property was acquired with the sole object of turning it over again at a profit and without any intention of holding it as an investment. "That describes", said Rowlatt, J., "what a man does if he buys a picture that he sees going cheap at Christie's, because he knows that in a month he will sell it again at Christie's". "That", according to

(1) (1930) 15 Tax Cas. 333.

1958

G. Venkataswami Naidu & Co.
v.
The Commissioner of Income-tax

Gajendragadkar J.

the learned judge, "is not carrying on trade" and "so what the Commissioners must do is to say, one way or the other, was this, I will not say carrying on a trade, but was it a speculation or an adventure in the nature of trade". The learned judge no doubt added that he did not indicate which way the finding ought to be, but he commended the Commissioners to consider what took place in the nature of organising the speculation, maturing the property and disposing of the property, and when they have considered all that, to say whether they think it was an adventure in the nature of trade or not. It is thus clear that Rowlatt, J., indicated clearly though in cautious words what he thought was the true nature of the transaction made. Even so, on reconsideration of the matter the Commissioners returned a finding in favour of the assessee. After the finding was returned Rowlatt, J., held that he must abide by his own decision in *Pearm* v. *Miller* (1) and so the appeal was allowed. The matter was then taken to the Court of Appeal where the revised finding of the Commissioners was treated as a finding on a question of fact not open to challenge and the point which was considered at length was whether even if the transaction was not an adventure in the nature of trade, could the profit resulting from it be taxed under Case VI? The Master of the Rolls Lord Hanworth traced the history of the dispute, mentioned how Mr. Justice Rowlatt had indicated to the Commissioners what they had to consider in determining the question remitted to them and observed that "Mr Justice Rowlatt, and I think this Court, might perhaps have taken the course of saying that having regard to what he had called attention to in this case, the particular facts, of organising the speculation, of maturing the property, and the diligence in discovering a second property to add to the first, and the disposing of the property, there ought to be and there must be a finding that it was an adventure in the nature of trade; but Mr. Justice Rowlatt withheld his hand from so doing and I think he was right, for however strongly one may feel as to the facts, the facts

(1) (1927) 11 Tax Cas. 610.

are for the decision of the Commissioners". It would thus be clear that the decision of the Commissioners appeared both to Rowlatt, J., and the Court of Appeal to be erroneous. Even so, they refused to interfere with it on the ground that it was a decision on a question of fact. We may, with respect, recall that it was in regard to this approach that Lord Radcliffe observed in the case of *Edwards* (1) that "it was a pity that such a tendency should persist to treat the findings of the Commissioners on the question as to the character of the transaction as conclusive". In dealing with the question as to whether if Case I did not apply Case VI could apply, Lord Justice Lawrence observed that "in the case of an isolated transaction of purchase and resale of property there is really no middle course open. It is either an adventure in the nature of trade, or else it is simply a case of sale and resale of property". The Court of Appeal held that if the transaction did not fall in Case I it was difficult to see how it could fall under Case VI. The discussion on this part of the case is, however, not relevant for our purpose. This decision of the Court of Appeal was taken before the House of Lords and the question debated before the House of Lords was about the application of Case VI to the transaction. The House of Lords affirmed the view taken by the Court of Appeal and held that "Case VI was inapplicable because Case VI necessarily refers to the words of Schedule D, that is to say, it must be a case of annual profits and gains and those words again are ruled by the first section of the Act which says that when an Act indicates that income-tax shall be charged for any year at any rate the tax at that rate shall be charged in respect of the profits and gains according to the Schedules". Lord Buckmaster agreed with the observations of Lord Justice Lawrence that there can be no middle course open in such cases. Viscount Dunedin, in concurring with the opinion of Lord Buckmaster, dealt with the several arguments urged by the Crown but the observations made by him with regard to the last argument are relevant for our purpose. "The last argument of the

(1) [1956] A.C. 14; 36 Tax Cas. 207.

1958

G. Venkataswami Naidu & Co.
v.
The Commissioner of Income-tax

Gajendragadkar J.

counsel for the Crown", observed Viscount Dunedin, "was that there was a finding that the respondent never meant to hold the land bought as an investment. The fact that a man does not mean to hold an investment may be an item of evidence tending to show whether he is carrying on a trade or concern in the nature of trade in respect of his investment but *per se* it leads to no conclusion whatever". According to Viscount Dunedin, recourse to Case VI ignores the fact that it had been settled again and again that Case VI does not suggest that anything that is a profit or gain falls to be taxed.

The observations made by Viscount Dunedin were considered in the *Commissioners of Inland Revenue* v. *Reinhold* (1). We ought to add that the appellant has placed strong reliance on this decision. In this case, the respondent was a director of a company carrying on a business of warehousemen; he bought four houses in January 1945 and sold them at a profit in December 1947. He admitted that he had bought the property with a view to resale and had instructed his agents to sell whenever a suitable opportunity arose. The profits made by him on resale were assessed to tax. On appeal before the General Commissioners he contended that the profit on resale was not taxable. The Crown urged that the transaction was an adventure in the nature of trade and that profits arising therefrom were chargeable to tax. The General Commissioners being equally divided allowed the appeal and discharged the assessment. It was on these facts that the matter was then taken before the First Division of the Court of Session and it was urged on behalf of the Crown that the initial intention of the assessee clearly was to sell the property at a profit and so the view taken by the General Commissioners about the character of the transaction was erroneous. This argument was, however, rejected and the order of discharge passed by the General Commissioners was confirmed. When the Crown referred to the observations of Lord Dunedin in the case of *Leeming* (2) which we have

(1) (1953) 34 Tax Cas. 389.
(2) (1930) 15 Tax Cas. 333.

already cited, Lord Carmont observed that he did not wish to read the said passage out of its context and without regard to the facts of the case then under consideration. Then Lord Carmont added that though the language used by Lord Dunedin "may cover the purchase of houses", it "would not cover a situation in which a purchaser bought a commodity which from its nature can give no annual return". "This comment of mine", said Lord Carmont, "is just another way of saying that certain transactions shew inherently that they are not investments but incursions into the realm of trade or adventures of that nature". Then reference was made to the fact that the assessee was a warehouse company director and not a property agent or speculator and that the only purchases of property with which he was concerned were two separated by ten years and that the first heritage was acquired without the intention to sell, which only arose fortuitously. His Lordship then put his conclusion in this way: "I would therefore say that the Commissioners of Inland Revenue have failed to prove —and the onus is on them—the case they sought to make out". According to Lord Carmont, Lord Dunedin's observations do not suggest that the initial declaration of intention *per se* leads to the conclusion that the transaction was in the nature of trade. He thought that much more was required to show that the assessee was engaged in an adventure in the nature of trade than was proved in the case before the court. Lord Russell, who concurred with this opinion, began with the observation that "prima facie the difference of opinion among the General Commissioners suggests that the case is a narrow one and that the onus on the appellants of showing that the transaction was an adventure in the nature of trade is not a light one". Lord Russell then mentioned the argument of the Lord Advocate that if a person buys anything with a view to sale that is a transaction in the nature of trade because the purpose of the acquisition in the mind of the purchaser is all-important and conclusive; and that the nature of the thing purchased and the other surrounding circumstances do not

1958

G. Venkataswami Naidu & Co. v. The Commissioner of Income-tax

Gajendragadkar J.

and cannot operate so as to render the transaction other than an adventure in the nature of trade, and observed that in his opinion the argument so formulated "is too absolute and is not supported by the judicial pronouncements on which it was sought to be raised". He then referred to the variety of circumstances which are or may be relevant to the determination of such a question; and he concluded with the observation that the appellants had not discharged the burden of showing that the transaction was an adventure in the nature of trade. Lord Keith also took the same view and stated that " the facts were, in his opinion, insufficient to establish that this was an adventure in the nature of trade". This case was no doubt a case on the border line; and if we may say so with respect it was perhaps nearer an adventure in the nature of trade than otherwise. It would not be unreasonable to suggest that, in this case, if the Commissioners had found that the transaction was an adventure in the nature of trade, the court would probably not have interfered with the said conclusion; but the Commissioners were equally divided and so the assessment had been discharged by them. It was under these circumstances that the point about the onus of proof became a matter of substance; and, as we have already pointed out, all the learned judges have emphasized that the onus had not been discharged and that no case had been made out for reversing the order of discharge passed by the Commissioners. However that may be, it would, we think, be unsafe to treat this case as laying down any general proposition the application of which would assist the appellant before us. We would also like to add that there can be no doubt that Lord Russell's criticism against the contention raised by the Lord Advocate was fully justified because the contention as raised clearly overstated the significance and effect of the initial intention. As we have already pointed out, if it is shown that, in purchasing the commodity in question, the assessee was actuated by the sole intention to sell it at a profit, that no doubt is a relevant circumstance which would raise a strong presumption that the

purchase and subsequent sale are an adventure in the nature of trade; but the said presumption is not conclusive and it may be rebutted or offset by other relevant circumstances.

What then are the relevant facts in the present case? The property purchased and resold is land and it must be conceded in favour of the appellant that land is generally the subject-matter of investment. It is contended by Mr. Viswanatha Sastri that the four purchases made by the appellant represent nothing more than an investment and if by resale some profit was realised that cannot impress the transaction with the character of an adventure in the nature of trade. The appellant, however, is a firm and it was not a part of its ordinary business to make investment in lands. Besides, when the first purchase was made it is difficult to treat it as a matter of investment. The property was a small piece of 28¼ cents and it could yield no return whatever to the purchaser. It is clear that this purchase was the first step taken by the appellant in execution of a well-considered plan to acquire open plots near the mills and the whole basis for the plan was to sell the said lands to the mills at a profit. Just as the conduct of the purchaser subsequent to the purchase of a commodity in improving or converting it so as to make it more readily resaleable is a relevant factor in determining the character of the transaction, so would his conduct prior to the purchase be relevant if it shows a design and a purpose. As and when plots adjoining the mills were available for sale, the appellant carried out his plan and consolidated his holding of the said plots. The appellant is the managing agent of the Janardana Mills and probably it was first thought that purchasing the plots in its own name and selling them to the mills may invite criticism and so the first purchase was made by the appellant in the name of its benamidar V. G. Raja. Apparently the appellant changed its mind and took the subsequent sale deeds in its own name. The conduct of the appellant in regard to these plots subsequent to their

1958

G. Venkataswami Naidu & Co. v. The Commissioner of Income-tax

Gajendragadkar J.

purchase clearly shows that it was not interested in obtaining any return from them. No doubt the appellant sought to explain its purpose on the ground that it wanted to build tenements for the employees of the mills; but it had taken no steps in that behalf for the whole of the period during which the plots remained in its possession. Besides, it would not be easy to assume in the case of a firm like the appellant that the acquisition of the open plots could involve any pride of possession to the purchaser. It is really not one transaction of purchase and resale. It is a series of four transactions undertaken by the appellant in pursuance of a scheme and it was after the appellant had consolidated its holdings that at a convenient time it sold the lands to the Janardana Mills in two lots. When the tribunal found that, as the managing agent of the mills, the appellant was in a position to influence the mills to purchase its properties its view cannot be challenged as unreasonable. If the property had been purchased by the appellant as a matter of investment it would have tried either to cultivate the land, or to build on it; but the appellant did neither and just allowed the property to remain unutilised except for the net rent of Rs. 80 per annum which it received from the house on one of the plots. The reason given by the appellant for the purchase of the properties by the mills has been rejected by the tribunal; and so when the mills purchased the properties it is not shown that the sale was occasioned by any special necessity at the time. In the circumstances of the case the tribunal was obviously right in inferring that the appellant knew that it would be able to sell the lands to the mills whenever it thought it profitable so to do. Thus the appellant purchased the four plots during two years with the sole intention to sell them to the mills at a profit and this intention raises a strong presumption in favour of the view taken by the tribunal. In regard to the other relevant facts and circumstances in the case, none of them offsets or rebuts the presumption arising from the initial intention; on the other hand, most of them corroborate

1958

G. Venkataswami Naidu & Co. v. The Commissioner of Income-tax

Gajendragadkar J.

the said presumption. We must, therefore, hold that the High Court was right in taking the view that, on the facts and circumstances proved in this case, the transaction in question is an adventure in the nature of trade.

The result is the appeal fails and must be dismissed with costs.

Appeal dismissed.

1958

November 24.

PUNJAB DISTILLING INDUSTRIES LTD.

v.

THE COMMISSIONER OF INCOME-TAX, SIMLA

(VENKATARAMA AIYAR, GAJENDRAGADKAR and A. K. SARKAR, JJ.)

Income-tax—Distiller taking deposit refundable on return of bottles—Balance of deposits after refund, if trading receipt—Indian Income-tax Act (XI of 1922), s. 10.

The appellant, a distiller of country liquor, carried on the business of selling liquor to licensed wholesalers. Due to shortage of bottles during the war a scheme was evolved, whereunder the distiller could charge a wholesaler a price for the bottles in which liquor was supplied at rates fixed by the Government, which he was bound to repay to the wholesaler on his returning the bottles. In addition to this the appellant took a further sum from the wholesalers described as 'security deposit' for the return of the bottles. Like the price of the bottles these moneys were also repaid as and when the bottles were returned with this difference that the entire sum was refunded only when 90% of the bottles covered by it had been returned. The appellant was assessed to income-tax on the balance of the amounts of these additional sums left after the refunds made thereout.

Held, that the amounts paid to the appellant and described as 'security deposit' were trading receipts and therefore income of the appellant assessable to tax. These amounts were paid as an integral part of the commercial transaction of the sale of liquor in bottles and represented an extra price charged for the bottles. They were not security deposits as there was nothing to secure, there being no right to the return of the bottles.