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August 31.

KARANPURA DEVELOPMENT CO., LTD.

v.

THE COMMISSIONER OF INCOME-TAX, WEST BENGAL

(P. B. GAJENDRAGADKAR, K. SUBBA RAO and M. HIDAYATULLAH, JJ.)

Income Tax—Appreciation of Capital or profits of business—Company formed for acquiring and working coal mining leases—Company developing coal fields and sub-leasing them—Income realised by way of increased salami—If amounts to profits of business—Liability to tax—Indian Income-tax Act, 1922 (11 of 1922) ss. 2(4), 10.

The assessee company was incorporated in 1920 with the objects, *inter alia*, of acquiring underground coal-mining and relative rights and to do business of coal raising etc. Power was given under the memorandum of association to lease, develop or otherwise deal with the property and rights of the company. The assessee acquired from time to time diverse coal-mining leases and after developing the coal-fields by providing means of communication etc., sub-leased them to collieries and other companies. As a condition of the acquisition of the head leases the assessee had paid *salami* at the rate of Rs. 40/- per standard bigha and had agreed to pay royalty at certain rates, while from the sub-leases it charged *salami* at the rate of Rs. 400/- and royalties at higher rates. For the assessment years 1949-50 and 1950-51 the assessee admitted the liability to tax in respect of the income arising from the enhanced royalties, but claimed that the excess amount realised by way of increased *salami* was an appreciation of capital and could not be taxed on the grounds that apart from obtaining head leases, developing the coal fields and sub-leasing its rights, the assessee did not do any business, either by working the coal-fields with a view to raising coal or by acquiring or selling coal raised by the sub-lessees.

Held, that the assessee company in acquiring the head leases and in granting the sub-leases was carrying on a business within its memorandum of association and that the increased *salami* received from the sub-lessees represented profits of that business, liable to be included in the assessable income for purposes income-tax and business profits tax.

Kamakshya Narain Singh v. *Commissioner of Income-tax* (1943) L.R. 70 I.A. 180, distinguished.

Californian Copper Syndicate (Limited and Reduced) v. *Harris*, (1904) 5 T.C. 159, relied on.

Case-law discussed.

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 376 to 379 of 1960.

Appeal from the judgment and order dated September 18, 1958, of the Calcutta High Court in Income-tax Reference No. 101 of 1954.

S. Mitra, S. N. Mukherjee and *B. N. Ghosh,* for the appellants.

M. C. Setalvad, Attorney-General of India, R. Ganapathy Iyer and *P. D. Menon,* for the respondents.

1961. August 31. The Judgment of the Court was delivered by

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HIDAYATULLAH, J.—These are four appeals filed by the assessee Company (Karanpura Development Co., Ltd.) in respect of two assessment years, 1949-50 and 1950-51 and two chargeable accounting periods under the Business Profits Tax Act, January 1, 1948, to December 31, 1949. By these appeals, the assessee Company impugns the judgment of the High Court of Calcutta dated September 18, 1958, answering a common question "whether on the facts and in the circumstances of the case, the sums received as *salami* by the assessee for granting sub-leases were trading receipts in its hands and the amount of profit therein is assessable under the Indian Income-tax Act" in the affirmative and against the assessee Company. The case was certified to this Court by the High Court under s. 66A (2) of the Income-tax Act presumably also read with s. 19 of the Business Profits Tax Act.

The facts of the case are as follows : In 1915, the Court of Wards representing the proprietor of the Ramgarh Estate granted a prospecting licence to Messrs. Bird & Co., of an area of coal-bearing lands described as the Karanpura Coal Fields. The licence was for 12 years but was renewable for another term of 12 years. The licence reserved to the licensee the right to take coal mining leases of the Karanpura Coal Fields or any part thereof. The

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licence was transferable. The assessee Company was incorporated in 1920. The objects for which the assessee Company was formed, *inter alia*, were :

"(1) to purchase and acquire from the owners or proprietors thereof or other persons interested therein underground coal mining, relative rights of and in the Karanpura Coal Fields in the Province of Bihar and Orissa at such price or prices for such period or periods and generally upon such terms and conditions as the Directors may determine and for that purpose to adopt, enter into and carry into effect all contracts, agreements and other documents, and in particular to enter into and carry into effect, with or without modifications, either before or after the execution thereof, the agreement referred to in Article 3 of the Company's Articles of Association.

(2) To sell, dispose of and otherwise deal in all such underground coal mining and relative rights upon such terms and conditions as may appear for the benefit of the company.

(3) To carry on the trades or businesses of colliery proprietors, coal merchants, miners, smelters, engineers, limeburners and manufacturers of brick, tile, cement, lime, coke and other bye-products of coal in all their respective branches.

x x x

(6) To prospect for, crush, win, get quarry, smelt, calcine, refine, dress, amalgamate, manipulate and prepare for market coal, ore, metal, and mineral substances of all kinds, and to carry on any other prospecting, mining or metallurgical operations, which may seem conducive to any of the company's objects and to buy, sell, manufacture, and deal in minerals, plants, machinery implements, conveniences, provisions, and things capable of being used in connection with prospecting,

mining or metallurgical operations or required by workmen or others employed by the company.

x x x

(34) To acquire by purchase, lease, exchange, or otherwise, lands, buildings, and heraditaments of any tenure or description and any estate or interest therein, and any rights over or interest therein, and any rights over or connected with land, and either to retain the same for the purpose of the company's business or to turn the same to account as may seem expedient.

x x x

(52) To sell, improve, manage, develop, exchange, lease, mortgage, dispose of, turn to account, or otherwise deal with all or any part of the property and rights of the company."

On May 30, 1921, Messrs. Bird and Co., assigned their rights under the prospecting licence to the assessee Company. The assessee Company then acquired from time to time diverse coal mining leases over areas aggregating 20,000 standard bighas. The assessee Company developed these coal fields by providing means of communication, etc., and then sub-leased them to collieries and other companies. In the head leases which the assessee Company had obtained, the term was 999 years. In the sub-leases the term was the balance of the period *minus* 2 days. Apart from obtaining head leases, developing the coal fields and subleasing its rights, the assessee Company admittedly did not do any business. It never worked the coal fields with a view to raising coal ; nor did it acquire or sell coal raised by the sub-lessees. As a condition of the acquisition of the head leases, the assessee Company had paid *salami* at the rate of Rs. 40 per standard bigha, and had agreed to pay royalty at certain rates. From the sub-lessees, the assessee Company charged *salami* at the rate of Rs. 400 per

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standard bigha and royalties at higher rates. For the assessment year, 1949-50, the assessee Company realised Rs. 19,14,035 as *salami* for the mining sub-leases granted in the relevant account year, and in the assessment year, 1950-51, it realised Rs. 3,96,000 on the same account. We are not concerned with the income of assessee Company arising from the enhanced royalties, because the assessee Company admitted that that income would be taxable. The assessee Company's contention that the excess amount realised by way of increased *salami* was on capital account and could neither be included in the assessable income for purposes of income-tax nor in the profits for purposes of business profits tax was rejected. Two orders in the income-tax cases and two in the business profits tax cases were passed on January 30, 1952. The assessee Company filed four appeals before the Appellate Assistant Commissioner, who dismissed them on March 31, 1953. Four appeals were then filed before the Income-tax Appellate Tribunal, Calcutta Bench, but were dismissed by a common order dated December 31, 1953. The Appellate Tribunal was then moved for a reference in all the four appeals, and the common question to which we have referred, was raised and referred by the Tribunal with the result already indicated.

The Tribunal as well as the High Court held that in acquiring the head leases and in granting the sub-leases, the assessee Company was carrying on a business within its Memorandum of Association and the increased *salami* received from the sub-lessees represented profits of that business liable to be included in the assessable income for income-tax purposes and in the profits, for purposes of the business profits tax. The case of the assessee Company was that it was holding its capital asset namely, the mining leases through its sub-lessees during the relevant accounting years, and its activities were the management of the leasehold right, selection of sub-lessees, collection of rents or royalties

which did not amount to the carrying on of a business. In return for the charge of *salami* the assessee Company transferred only the general right to the benefits under the leases, and that was a realisation of its capital within the ruling of the Privy Council in *Kamakshya Narain Singh* v. *Commissioner of Income-tax* (1) In transferring this general right, it was contended, the position of the assessee Company was indistinguishable from of that a land owner, who collected rents. All these arguments were advanced before the Tribunal as well as before the High Court but were not accepted. In these appeals, we are required to consider whether the conclusions reached by the High Court and the Tribunal are right.

The Income-tax Act puts the tax on income profits and gains irrespective of the source from which they are derived. Section 3 of the Act provides, *inter alia*, that income-tax shall be charged on the total income of every company. Under s.4(1), total income includes all income, profits or gains from whatever source derived, subject to certain conditions about residence, etc., with which we are not concerned. Section 6 then enumerates six heads of income chargeable to income-tax. Two of these heads are (a) income from property and (b) profits and gains of business, etc. The several heads into which income is divided under the Income-tax Act do not make different kinds of taxes. The tax is always one; but it may arise from different sources to which the different rules of computation have to be applied. The manner of this computation is indicated in the sections that follow. Before income profits or gains can be brought to computation they have to be assigned to one or more heads. These heads are in a sense exclusive of one another and income which falls within one head cannot be assigned to, or taxed under another head.

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The words "income" has not been defined in the Income-tax Act. In the definition which is enacted certain receipts are said to be included in the concept of income; but it does not say that "income" itself means. Certain working definitions have been given by Courts, chief among which is by the Judicial Committee in *Commissioner of Income-tax* v. *Shaw Wallace & Co.* (1) where it was held that by income is meant a periodical monetary receipt, not in the nature of a windfall but coming in with some sort of regularity or expected regularity. In business, it was also pointed out, income was the produce of something "loosely spoken of as capital". This income in business is profit which is earned by a process of production, or, in other words, by the continuous exercise of an activity. These observations of the Privy Council were quoted with approval by this Court in many cases and recently in *Sonairam Doongarmall* v. *Commissioner of Income-tax* (2). In the last case, it was also pointed out that the addition of the words "profits and gains" in the phrase "income, profits and gains" used in the Income-tax Act does not restrict the meaning of the word "income" by implication, and that the whole expression is "income" writ large.

But whatever "income" may include or mean it is however, clear that it does not include fixed capital or the realising of fixed Capital by turning it into some other form of capital or money. Fixed capital is something which the owner keeps in his possession but turns to profit; circulating capital however, is turned over in the process of profit making. It may sometimes happen that in the process of production, fixed capital may be consumed or wasted, but that is a reduction of capital and not an expenditure in the business claimable as an allowance in the reduction of assessable income in the shape of profits of the business.

The profits of a business are calculated under s.10 of the Act. Under that section, tax is payable

(1) [1932] L.R. 59 I.A. 206. (2) [1962] 1 S.C.R. 257.

by a company under the head "profits and gains of business..." in respect of the profits or gains of any business carried on by the company. In s. 2 (4) of the Indian Income-tax Act, "business" has been defined to include any trade, commerce or any manufacture or any adventure or concern in the nature of trade, commerce or manufacture. In all cases where an assessee questions the finding that assessable profits or gains have been made in a business it is customary to find the assessee questioning that a business has at all been carried on, and further that the return is on the capital account and not revenue. This well-trodden path was also followed in this case, and the assessee Company has raised three contentions. It contends that the return to it as *salami* represented merely a capital return because in acquiring the mining lease the assessee Company acquired two distinct rights, (a) the general right to the benefits under the leases for which consideration was the *salami*, and (b) the right to carry on business in coal. According to the assessee Company, it never exercised the second right and when it parted with the first right, it only realised its capital. This is the first contention. The assessee Company next contends that there is no difference between an individual owning properties and selling them, on the one hand, and a company owning mining leases and issuing sub-leases, on the other, because in either case, there are no profits or gains of businees, if no business is done. Lastly, it contends that even if the assessee Company was carrying on business, it was not carrying on a trading activity but its activities consisted in merely collecting rents or royalties which taken with the performance of other necessary and allied activities could not amount to the carrying on of a business resulting in increased *Salami* as profits of the business.

No doubt, in *Kamakshya Narain Singh* v. *Commissioner of Income-tax* (1) the Privy Council

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made a distinction between sums received as royalties and *Salami* by the proprietor of the Ramgarh Estate holding the former to be income from other sources within s. 12 of the Act, and the latter as a payment on capital account; but the facts were different. Since the case is relied upon by the assessee Company, it is necessary to consider it in some detail. The Court of Wards, acting on behalf of the proprietor of Ramgarh Estate, granted leases for 999 years to certain companies including the assessee Company. Under the terms of the leases the lessees agreed to pay to the lessors royalties at certain rates per ton of different kinds of coal raised and a fixed *salami* or premium, the royalty being subject always to a minimum annual sum. It was contended on behalf of the proprietor that none of the sums was taxable as income. The contention of the proprietor with regard to the royalty per ton and the minimum royalty was not accepted but with regard to the *salami* it was. The Judicial Committee observed :

> "The *salami* has been, rightly in their Lordships' opinion, treated as a capital receipt. It is a single payment made for the acquisition of the right of the lessees to enjoy the benefits granted to them by the lease. That general right may properly be regarded as a capital asset, and the money paid to purchase it may properly be held to be a payment on capital account."

In that case, the general right was, in effect sold by the proprietor of the Estate. In his hands as a landowner, the coal bearing lands were property and when he sold the right to the lessees to enjoy the benefits, he sold his property but he was not doing business. The proprietor parted with the general right, but in his hands it was not the stock-in-trade of any business. In his hands the lands or the rights in respect of them were property, but that character did not necessarily continue in the

hands of his lessees. If the lessees treated these lands, so to speak, as the stock-in-trade of their business and turned them to account at a profit, the profit so gained may legitimately be considered as the profit of business. It is contended that there is no difference between a landowner and a company which owns land or leases in land, and reliance is placed upon the case of *Balgownie Land Trust Ltd.* v. *Commissioner of Inland Revenue* (1). In that case, the owner of an estate left his landed estate to the trustees "with a direction to realise". The trustees were unable to dispose of the land on the market and formed a company to deal in real property to which the estate was transferred in exchange of shares allotted to the beneficiaries. The company then acquired other properties as well, and received rents which were paid as dividends and then sold the newly purchased property and parts of the estate making a profit. It was held that the profits from the sales were profits of a trade or business.

The actual decision is against the assessee Company, but what is relied upon is a passage in the judgment of the Lord President (Clyde) in the Court of Session (Scotland) at p. 692, where it is observed:

> "One is not, however, entitled to infer from the circumstances that a company is professedly formed with trading purposes in view and for trading objects that the transactions in which it engages necessarily constitute a trade or business; because it does not follow from the fact that it has objects and powers such as I have indicated that it actually uses them for the purpose of conducting the usual business of a company trading in real estate."

(1) (1929) 14 T. C. 684.

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If the assessee Company was not doing business but was merely realising the property which it had acquired, this passage might have been of some use ; but, as will be shown later, there was more than mere realising of its property in the present case, and the further observations of the Lord President apply, which run :

> "But the professed objects of a company are not for that reason, to be left out of account ; on the contrary, they must be kept in view when considering the transactions in which the company is proved to have been engaged."

Reliance is also placed upon certain observations of Lord Warrington of Clyffe in *Fry* v. *Salisbury House Estates, Ltd.* (1), where it was said :

> "Assuming the memorandum of association allows it, and in this case it unquestionably does, a company is just as capable as an individual of being a landowner and as such deriving rents and profits from its land, without thereby becoming a trader, and in my opinion it is the nature of its operations, and not its own capacity, which must determine whether it is carrying on a trade or not."

We need not pause to consider the facts in that case, because we shall deal with it in detail presently ; but it is clear even from this passage that the deciding factor is not ownership of land or leases but the nature of the activity of the assessee and the nature of the operations in relation to them. The objects of the company must also be kept in view to interpret the activity. As was observed by Lord Sterndale, M. R. in *The Commissioners of Inland Revenue* v. *The Korean Syndicate Ltd.* (2),

> "If you once get the individual and the company spending exactly on the same basis,

(1) [1930] A. C. 432. (2) (1921) 12 T. C. 181.

> then there would be no difference between them at all. But the fact that the limited company comes into existence in a different way is a matter to be considered. An individual comes into existence for many purposes, or perhaps sometimes for none, whereas a limited company comes into existence for some particular purpose, and if it comes into existence for the particular purpose of carrying out a transaction by getting possession of concession and turning them to account, then that is a matter to be considered when you come to decide whether doing that is carrying on a business or not."

The decision in this case must, therefore, turn upon the objects for which the Company was formed, and whether one of the objects of the Company was to develop and sell leases and leaseholds with an eye to making profit and what its activity was, in relation to its objects. Before, however, we analyse the objects for which the assessee Company was formed and scan its activities, it is instructive to refer to two cases to which the learned Attorney-General for the Department called our attention and which have also formed the basis of the decision of the High Court and the Tribunal.

The first is the well-known case of *Californian Copper Syndicate (Limited and Reduced)* v. *Harris* (1). There, the assessee company was formed, *inter alia*, with the following objects :

> "(1) To acquire copper and other mines, mining rights, metalliferous and auriferous land, in California or elsewhere in the United States of America, and any interest therein, and in particular to acquire the mines known as (here follow some names) situate in the county of.....
> .....

(1) (1904) 5 T. C. 159.

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(17) To sell, lease, charter or otherwise dispose of absolutely or conditionally, or for any limited interest, the whole or any part of the undertaking, property, rights, concessions or privileges of the Company for such consideration in cash, shares or otherwise as the Company may think fit.....".

The Company acquired 480 acres of copper-bearing land for £. 24,000 and spent money on development. Later, 80 acres of this land were sold to Fresno Copper Company, Ltd., for £. 105,000 payable wholly in fully paid shares of the Fresno Copper Company. Later, the Company sold the remaining 400 acres for £. 195,000 payable wholly in fully paid shares of Fresno Copper Company. The Fresno Company had 400,000 shares of £. 1 each, and of these, 300,000 were allotted to the Company. The Company made no profits assessable to income-tax, and the question was whether the net gain derived from the sale of the property could be deemed to be profit. The Company contended that this was only a conversion of one kind of capital into one of another kind. In the Court of Exchequer (Scotland) Lord Justice Clerk distinguished between two kinds of cases—(a) where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at; and (b) where the act is done not merely as a realisation but in what is truly the carrying on or carrying out, of a business. He observed:

> "There are many companies which in their very inception are formed for such a purpose, and in these cases, it is not doubtful that, when they make a gain by a realisation, the gain they make is liable to be assessed for Income Tax."

The learned Lord Justice observed that the line might be difficult to draw and each case must be

decided on its own facts and posed the question, which is the question to ask here :

> "Is the sum of gain that has been made a mere enhancement of value by realising a security, or it is a gain made in an operation of business in carrying out a scheme for profit-making ?"

The facts in the case were held to indicate a highly speculative business, and it was said that the mode of the actual procedure employed also indicated a trading venture. Lord Trayner also agreed, observing that it was "a proper trading transaction" and one which was not only within the power of the company but also authorised by the Articles.

The next case is *British South Africa Co.* v. *Commissioner of Income-tax* (1). In that case, the assessee was the British South Africa Co., which was incorporated, *inter alia,* for carrying into effect concessions and agreements which had been made by certain chiefs of South Africa and such other concessions which the Company might acquire. After acquiring such concessions and mining rights, the Company gave special grants to other companies in return for fully paid shares and annual payments over a fixed number of years. The Income-tax authorities in Rhodesia treated these sums as profits, and assessed to income-tax the full par value of the shares. It was held that the sums were not capital receipts but income from business. The High Court of Rhodesia and the Rhodesian Court of Appeal affirmed the view of the Income-tax authorities. On appeal, the Privy Council did not endorse the view of the Rhodesian Courts on certain aspects of the case, with which we are not here concerned, but went on to enquire into the nature of the receipts in question. Their Lordships in this connection endorsed the view of Hudson, P. that the payments were income derived from the business of turning to account

(1) [1946] 14 I. T. R. Supp. 17.

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the Company's rights under the concessions of winning and disposing of minerals by participating in the proceeds of the exploitation of such rights by its licensees and the income was, therefore, taxable as being the profits or gains of a trade or business. Their Lordships also held that it was not material "that in dealing with its mineral rights the Company has retained an interest either by way of a possible reverter of the property or by a shareholding in a company to which it made a special grant."

The case, of course, is one to which the warning often given that it is not desirable to rely upon decisions under different taxing statutes would seem applicable ; but in the judgment of the Privy Council, it is made clear that the Rhodesian Act was not different from the British law. The decision also rests, not upon the provisions of any special enactment but upon the more general consideration whether such receipts can be considered in a business sense as belonging to capital account or revenue and in what circumstances.

These two cases and particularly the *Californian Copper Syndicate case* (1) cited by the learned Attorney-General do establish that if a company sold its assets as a part of its business with the objects for which the company was formed, the excess receipts over the expenses of acquisition can be regarded as profits or gains of the business.

The case of the *Californian Copper Syndicate Ltd.* (1) is so similar in facts as to be almost decisive; but the assessee Company relies upon *Tebrau (Johore) Rubber Syndicate Ltd. v. Farmer* (2) as laying down the principle which should govern this case. In that case, a company was formed with the object of acquiring estates in the Malay Peninsula and developing them by planting and cultivating rubber trees. The Memorandum of

(1) (1904) 5 T.C. 159. (2) (1916) 5 T.C. 658.

Association contained a power to sell the property in the following terms:

> (12) "To sell, or otherwise dispose of, as a going concern or otherwise, the whole or any part of the business undertaking and property of the Company for such consideration as the Company shall think fit."

Two estates were purchased, but for want of adequate capital were sold to another company for consideration in the shape mainly of shares in the second company. The return thus exceeded the amount of capital expended in making the acquisitions. Before the sale, however, a considerable part of the estates had been planted with rubber trees but no rubber had been produced and the first company had not reached the production stage. The Company had thus not earned any income except what it got by the sale. This was claimed to be an increase of capital. The Surveyor of Taxes relied, *inter alia*, upon the *Californian Copper Syndicate case* (1). It was held by the Court of Exchequer (Scotland) that the profit on sale was merely an appreciation of capital and not profit assessable to income-tax. Lord Salvesan observed that he was unable to distinguish the position of the company from that of a person who acquired property by way of investment and who realised it afterwards at a profit. He, however, observed:

> "No doubt if it is a part of his business to deal in land or investments, any profits which in the course of that business he realises form part of his income; but the mere fact that a person or company has invested funds in the purchase of an estate which has subsequently appreciated and so has realised a profit on his purchase does not make that profit liable to assessment."

The Californian Copper Syndicate case (1) was

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distinguished, because in that case, Lord Trayner had found that business was being done, and the following observation, from Lord Trayner's Judgment were emphasised:

> "I am satisfied that the Appellant company was formed in order to acquire certain mineral fields or workings--not to work the same themselves, for the benefit of the Company, but solely with the view and purpose of reselling the same at a profit."

Lord Salvesen pointed out that such an inference could not be drawn about the case before him.

These two sets of cases illustrate forcefully the changing circumstances in which an excess return may be treated as an appreciation of capital or as profit. If the sale is after a company is wound up and business has stopped, it may (subject to special statutory provisions) be said that any excess amount received over and above the capital of the company is merely an appreciation of capital; but the same cannot be said if business is being done in lands, mineral concessions, mining rights with a view to making profits. In the latter case, a sale at an enhanced price is not appreciation of capital but profit in the way of business, and the sale is, so to speak, of stock-in-trade.

Mr. Mitra relies upon three cases to establish that no business at all was being done. He contends that the assessee Company was merely granting sub-leases of property of which they had the reverter and all that the assessee Company did was to collect rent and royalties. Before dealing with the cases, it is necessary to point out that the ultimate reverter has no significance. The term is 999 years less a few days. Even if it was shorter, a possible reverter is not material. The observations of the Judicial Committee in the case from Rhodesia quoted earlier have our assent.

The first case relied upon is *East India Prospecting Syndicate* v. *Commissioner of Excess Profit Tax*(1). In that case, the facts were very different. In 1919, *V.C.*, a limited Company, obtained a prospecting licence from the Raja of Talchar in respect of some 8 sq. miles of coal-bearing lands. On August 5, 1920 a partnership was formed which was named the East India Prospecting Syndicate. The objects of the partnership were:

> (1) to purchase from the Company their rights under the prospecting licence;
>
> (2) to give effect to the conditions of the said licence ; and
>
> (3) to promote a company or companies with limited liability for the purpose of acquiring at a profit to the Syndicate all or any of the properties including the benefit of the prospecting licence.

The Syndicate acquired the prospecting licence from the Company, *V.C.* In 1921, the Syndicate obtained a mining lease from the Raja of Talchar over about 500 acres for 30 years with option to renew. The Syndicate then promoted a Company called the Talchar Coalfield Ltd., (shortly *T.C.*) and sub-let the mining property to it. They received payment in cash, in the shape of shares in *T.C.* and certain amounts periodically which were in excess of the amounts payable for a like period to the Raja of Talchar. The contention of the Syndicate was that they were not carrying on any business. It was held that the activities of the Syndicate did not amount to a business and their receipts could not be regarded as profits of business and were not chargeable to excess profits tax. It was conceded by the Department in that case that the functions of the Syndicate, which was a partnership, and neither a limited Company nor an incorporated society, consisted

(1) [1951] 19 I.T.R. 571.

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wholly in the holding of property, and that they had no other functions whatsoever. It was, therefore, held that the proviso to s. 2(5) of the Excess Profits Tax Act, which defined business in certain circumstances, was not applicable, that proviso read:

> "Provided that where the functions of a company or of a society incorporated by or under any enactment consist wholly or mainly in the holding of investments or other property, the holding of the investments or property shall be deemed for the purpose of this definition to be a business carried on by such company or society."

Harries, C.J., and Chatterjee, J., held that, on the principle *expressio unius exclusio alterius*, the fiction in the proviso was not applicable to individuals and other bodies. It was, however, pointed out that:

> "If this sub-lease had been granted by a limited company or by an incorporated society the net profit could be regarded as profits for the purposes of Excess Profits Tax Act by reason of the proviso to Section 2(5) of the Act."

The case was thus decided on the words of s. 2(5) of the Excess Profits Tax Act and the fact that the Syndicate was a partnership. The High Court then went on to consider the nature of rents and royalties received by the Syndicate, and held on the authority of *In re Commercial Properties Ltd.* (1) that for income-tax purposes the income would fall to be considered under s. 9 and not s. 10.

It will be noticed that there was but one property which the Syndicate held and the whole of that property was sub-let to *T. C.* Before it was so sub-let, it was not being used for any business and all that the Syndicate did with it was to lease

(1) (1928) I.L.R. 55 Cal. 1057.

it out. It was, in these circumstances, that it was held to yield income from property and not profits or gains from business. The case is analogous to *In re Commercial Properties Ltd.* (1), which is also cited by the assessee Company. There, the object of the registered company was to acquire land, build houses and let premises to tenants in Calcutta and elsewhere. The sole assets were three properties which were let out and all that the registered company did was the management and collection of rents. Rankin, C. J., held that the receipts were income from property within s. 9 of the Income-Tax Act, that letting out such property and collecting rents was not doing business, and that profits and gains from business were very different from income from property. These two cases were decided on their very special facts. The first was a case of excess profits tax, and the fiction created by s. 2(5) of the Excess Profits Tax Act not being applicable, the nature of the business, if any, was examined, and it was held that there was no more than collection of rents from property. The second case was also one of rents from property and not of profits from business.

The last case relied upon is *Fry* v. *Salisbury House Estate Ltd.* (2) already mentioned in this Judgment. Salisbury House was a building with 800 rooms. A company was formed for the express purpose of acquiring it and utilising it. The rooms were let unfurnished to tenants, but there was some slight service in the shape of heating and cleaning. The company also retained some rooms as its offices. The company was first assessed under r.8(c)(i) of Sch.A VII of the English Income-tax Act of 1918, which provided for assessment of landlords instead of tenants in the case of any house or building let in apartments or tenements. The company paid the tax assessed on it. Then a notice was sent under Sch. D. The company admitted

(1) (1928) I.L.R. 55 Cal. 1057. (2) [1930] A.C. 432.

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that it had to pay tax under Sch. D on profi it might have made from the services it rendered but contended that income which had been taxec under Sch. A could not be taxed under Sch. D. The company demanded a case. Rowlatt, J., hele against the company, but his decision was reversec by the Court of Appeal. On further appeal to the House of Lords, it was held that the rents were profits from ownership of land and assessment under Sch. A was the proper mode and they could not be treated as trade receipts of the company for purposes of Sch. D. The assessee Company has relied upon certain passages in the speeches of the learned and noble Law Lords, one of which from speech of Lord Warrington of Clyffe has already been quoted. It is not necessary to quote the other passages except one from the speech of Lord Tomlin because the purport is the same. Says Lord Tomlin :

> "Further in my view the perception of rents as land owner is not an operation of trade within the meaning of the Act. If this be so, I am unable to appreciate how the existence of ancillary activities which produce profits taxable under Schedule D can affect the nature of the operation or how the legal significance of the perception is altered for the purpose of income-tax if the recipient is a limited company rather than an individual."

As has been already pointed out in connection with the other two cases where there is a letting out of premises and collection of rents the assessment on property basis may be correct but not so, where the letting or sub-letting is part of a trading operation. The dividing line is difficult to find ; but in the case of a company with its professed objects and the manner of its activities and the nature of its dealings with its property, it is possible to say on which side the operations fall and to what head the income is to be assigned.

Ownership of property and leasing it out may be done as a part of business, or it may be done as land owner. Whether it is the one or the other must necessarily depend upon the object with which the Act is done. It is not that no company can own property and enjoy it as property, whether by itself or by giving the use of it to another on rent. Where this happens, the appropriate head to apply is "income from property" (s. 9), even though the company may be doing extensive business otherwise. But a company formed with the specific object of acquiring properties not with the view to leasing them as property but to selling them or turning them to account even by way of leasing them out as an integral part of its business cannot be said to treat them as landowner but as trader. The cases which have been cited in this case both for and against the assessee Company must be applied with this distinction properly borne in mind. In deciding whether a company dealt with its properties as owner, one must see not to the form which it gave to the transaction but to the substance of the matter. *The Californian Copper Syndicate case* (1) illustrates vividly dealings with mineral rights and concessions by a company as part of the objects of its business, or, in other words, in the doing of the business. The Calcutta cases and the case of *Fry* v. *Salisbury House Estate Ltd.*(2) illustrate the contrary proposition. There, the property, though dealt with by a company intending to do business, was dealt with as landowner. The intention in those cases was not to derive profit by business done with those properties but to derive income by renting them out. Where a Company acquires properties which it sells or leases out with a view to acquiring other properties to be dealt with in the same manner, the company is not treating them as properties to be enjoyed in the shape of rents which they yield but as a kind of circulating capital leading to profits of business, which profits

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may be either enjoyed or put back into the business to acquire more properties for further profitable exploitation.

We shall now turn to the present case, because it remains to consider what the assessee Company was doing with the head leases. The relevant clauses of the Memorandum of Association of the assessee Company have already been quoted. They show the various objects for which the assessee Company was incorported. Though power was taken under cls. (2), (3), (6) and (34) to do business of coal-raising, etc., the assessee Company did not do the sort of business authorised there. It restricted its business to cls. (1) and (52). Under cl. (1), power was taken to purchase and acquire underground coal-mining and relative rights. Under cl. (52), power was taken to sell, improve, manage, develop, exchange, lease, mortgage, dispose of, turn to account or otherwise deal with all or any part of the property and rights of the Company. Business was done extensively within these two clauses. Annexure F shows the areas which were sub-leased. A glance at the chart shows the large number of sub-leases and the different companies to which the sub-leases were granted. These sub-leases were granted, because the assessee Company wanted, was a matter of business, to turn its rights to account. The assessee Company opened out, and developed the areas, and then granted these sub-leases with an eye to profit. It is clear from these operations that the assessee Company having secured a large tract of coal-bearing land parcelled and developed it into kind of stock-in-trade to be profitably dealt with. The assessee Company extended its business along these lines acquiring fresh fields. In the circumstances, the nature of the business was trading within the objects of the Company and not enjoyment of property as land owner. There was also no sale of its fixed capital at a profit. In our opinion,

the High Court rightly answered the question against the assessee Company.

In the result, the appeals fail, and are dismissed with costs.

Appeals dismissed.