1962 *Present :* **H. N. G. Fernando, J., and Herat, J.**

D. S. MAHAWITHANA, Appellant, *and* COMMISSIONER OF INLAND REVENUE, Respondent

S. C. 1 of 1962—Income Tax Case Stated BRA/229

Income tax—" Adventure in the nature of trade "—Taxability of profits therefrom—Case stated—Scope and nature of power of Supreme Court to interfere on questions of fact—Income Tax Ordinance, ss. 6 (1) (a), 78.

The assessee-appellant purchased a tea estate for the purpose of selling it in parts for a profit.

Held that the transaction was an adventure in the nature of trade and, therefore, the profit made from it was taxable under section 6 (1) (*a*) of the Income Tax Ordinance.

Held further, that, in a case stated under section 78 of the Income Tax Ordinance, the Supreme Court could consider the correctness of the inference drawn by the Board of Review as to the assessee's intention, only (*a*) if that inference had been drawn on a consideration of inadmissible evidence, or after excluding admissible and relevant evidence, (*b*) if the inference was a conclusion of fact drawn by the Board but unsupported by legal evidence, or (*c*) if the conclusion drawn from relevant facts was not rationally possible, and was perverse and should therefore be set aside.

CASE stated under the Income Tax Ordinance.

H. V. Perera, Q.C., with *S. Ambalavanar* and *D. E. V. Dissanayake*, for the assessee-appellant.

A. C. Alles, Deputy Solicitor-General, with *E. D. Wikramanayake*, Crown Counsel, for the respondent.

Cur. adv. vult.

June 28, 1962. H. N. G. FERNANDO, J.—

In this Case Stated under the Income Tax Ordinance the Board of Review in paragraph 29 of the case states " the assessee by his communication on 31.8.1961 . . . . . applied to the Board to have a case stated for the opinion of the Honourable the Supreme Court on the questions of law arising in this case and this case is stated accordingly ". The communication mentioned does not satisfactorily set out the questions upon which the opinion of the court is sought and parts of it merely contain certain submissions as to the manner in which the Board of Review considered the Association's appeal. Having regard to certain observations in an Indian judgment which will be referred to later, the proper form of the question of law arising for our consideration is whether " on the facts and circumstances proved in the case, the inference that the transaction

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in question was *an adventure or concern in the nature of trade* is in law justified ". In view of the various considerations which become relevant, I think it useful to set out *seriatim* various transactions in which the assessee was proved to have been concerned :—

(1) The assessee was the owner of the Tismode Tea Factory where he manufactured tea from " bought leaf " but he did not own any land cultivated with tea.

(2) On 1.10.1954 the assessee made an offer to the proprietors of Belwood Estate for the purchase of the estate of 583 acres for the sum of Rs. 1,300,000 and forwarded a cheque for Rs. 130,000 as a deposit of 10% of the purchase price. On 11.10.1954 the offer was increased to Rs. 1,335,000 and a further deposit of Rs. 3,500 was made.

It would appear that one Mr. Wijesinghe assisted the assessee financially to make the deposit, and was in addition himself interested in the same way as the assessee, though perhaps not to the same extent, in the success of transactions in contemplation when these offers were made.

(3) Belwood Estate consisted of fields numbered 1 to 12 and of another lot described as lot 112. The assessee's offer was accepted and on 25.11.1954 he entered into a notarial agreement to purchase the estate before 1st January 1955. the agreement providing that the deposit of Rs. 133,500 would be forfeited if the transaction was not completed before the due date.

(4) On 4th December 1954, the assessee and one Seiyed Mohamed executed a deed by which Mohamed agreed to purchase from the assessee for the sum of Rs. 730,000 fields 6 to 10 and lot 112. A deposit of Rs. 73,000 was then made with the assessee which was liable to forfeit if the purchaser failed to complete the purchase on 31.12.1954. The assessee also agreed in this deed to make or arrange for a loan to Mohamed of Rs. 300,000 on the security of the lands covered by the agreement.

(5) On 31.12.1954, which was the last day on which the assessee might complete the purchase of Belwood Estate, several deeds and agreements were executed :—

(*a*) The assessee and Wijesinghe of the first part, and the same Mohamed and two others of the second part, agreed that the conveyance of Belwood Estate to be executed by the proprietors would be executed in the name of all these five persons, and that the parties would thereafter enter into a deed of partition by which the party of the second part would take fields numbered 3, 4, 6 to 10 and lot 112, the assessee and Wijesinghe taking fields No. 1, 2, 5, 11 and 12. In this deed of agreement it was stated that Mohamed and the other two persons had contributed Rs. 950,000 of the consideration to be paid for the purchase of the estate.

(*b*) In accordance with the agreement just mentioned, the executed the conveyance of Belwood Estate in favou five persons, and thereafter these five persons joine executing the contemplated deed of partition.

(*c*) Mohamed and the other two persons mortgaged to the assessee and Wijesinghe, for a sum of Rs. 100,000, the fields allotted to them in the deed of partition.

(*d*) The assessee and Wijesinghe mortgaged their fields to Messrs. Keil & Waldock to cover a loan of Rs. 100,000.

(*e*) The assessee and Wijesinghe agreed to sell to Mohamed fields No. 1 and 2 for Rs. 259,000, a deposit of Rs. 100,000 being then made by Mohamed, the balance consideration to be paid within three months, and the deposit to be forfeited if Mohamed failed to complete the purchase within the three months. (This transaction was duly completed on 31.3.1955 when the assessee and Wijesinghe conveyed fields No. 1 and 2 to Mohamed.)

(6) On 23rd February 1955 the assessee agreed to sell to one Shaul Hameed, the field No. 5 for Rs. 200,000, a deposit of Rs. 20,000 being made subject to forfeit if the purchase was not complete on or before 31.3.1955. In this agreement too. the assessee undertook to provide or arrange for a loan of Rs. 75,000 on the hypothecation of the field. This transaction was duly completed on 31.3.1955 when field No. 5 was conveyed to Shaul Hameed and several others.

(7) On 5th May 1955 the Government Agent published a notice of acquisition covering 40 acres out of fields No. 11 and 12, now belonging to the assessee and Wijesinghe, but on representations made by them the Government decided to acquire the entirety of both fields, amounting to 62 acres and ultimately at the end of the year 1955 they were paid compensation of about Rs. 129,000.

It was adduced in evidence that the assessee and Wijesinghe were aware, before an offer was first made to the proprietors of Belwood Estate, that acquisition by the Government, at least of a small portion of the estate, had been then in contemplation.

(8) In 1954 the assessee borrowed various sums of money as follows :—

		Rs.
30. 1.1954	from Messrs. Shaw Wallace & Hedges a loan of ..	90,000
4. 9.1954	,, ,, ,, ,, ,, ,, ,, ..	40,000
23.12.1954	,, ,, ,, ,, ,, ,, ,, ..	20,000
21.12.1954	from the Bank of Ceylon ,, ,, ..	15,000
31.12.1954	,, Messrs. Keil & Waldock ,, ,, ..	100,000

For the year of assessment 1954/5 and 1955/6 the assessee was assessed to income tax and profit tax on the basis that the amount of the profits accruing to the assessee from all these transactions were assessable to tax, and this assessment was confirmed on appeal by the Commissioner.

. the assessee appealed to the Board of Review, maintaining
.e assessee and Wijesinghe intended to retain for themselves fields
.bered 1, 2, 5, 11 and 12, but that the assessee was compelled by
.nanged circumstances to sell the fields Nos. 1, 2 and 5. On this appeal the Board of Review held that the profit was taxable under section 6 (1) (*a*) of the Ordinance, as profit made in an adventure in the nature of trade. Despite the oral evidence of the assessee and of Wijesinghe, that they had intended to retain a part of the property, the Board held that they had in fact entertained no such intention and that on the contrary the assessee purchased the estate for the purpose of selling it in parts for a profit. In rejecting this evidence the Board took account of several matters.

The assessee's position before the Board was that he desired to retain some Tea land for himself because it was difficult to obtain sufficient "bought leaf" for his factory and that he intended to utilise the leaf from the land retained for manufacture in his factory. Firstly the Board considered the explanation given to them by the assessee for his having subsequently changed this alleged intention and decided to sell fields 1, 2 and 5. Roughly speaking, this explanation was that Mohamed had in December 1954 threatened to drop out of the whole transaction if fields 1 and 2 were not also sold to him, and that thereafter the assessee decided to sell field No. 5 as well because, once he was deprived of fields 1 and 2, there was no purpose in retaining the field No. 5. But on previous occasions quite different explanations had been made by or on behalf of the assessee to the tax authorities. In August 1956 the explanation had been that fields 1, 2 and 5 had been sold because of the danger of Government acquisition and because the assessee did not want to be caught out with the bad portion of the estate. Again in February 1959 a Firm of accountants had stated on behalf of the assessee that the fields were sold because tea prices were coming down and because the assessee had mortgaged his tea factory to raise money for his purchase. Yet again in June 1960 another Firm of accountants had stated that fields 1 and 2 were retained for a time only because Mohamed and others had no sufficient funds then (in December 1954) to buy these fields and that the assessee and Wijesinghe took over those fields on the agreement that Mohamed would purchase them within three months. Indeed this last explanation does appear to me to be the correct one, for it is a perfectly reasonable explanation having regard to the actual agreement and conveyance covering the two lots.

The Board also held that the assessee's version that he sold fields 1 and 2 because of some threat from Mohamed was a very improbable story. True it was that, if the transaction for the purchase of Belwood Estate fell through, the assessee stood to lose the deposit of Rs. 133,000 he had made in October 1954; but it is equally true that Mohamed would in the same event have lost his own deposit of Rs. 73,000, and would thus have been the bigger loser. Counsel for the assessee has argued in this connection that the Board of Review does not in its order expressly refer to the evidence of two proctors, which in part supports the version that

on 31st December 1954 the assessee was reluctant to sign the agreement for sale of lots 1 and 2 although he had earlier agreed orally to do so. As to these two witnesses, the Board merely states that it has taken their evidence into consideration.

For the present, it suffices to observe that even if this evidence had been accepted by the Board, it would not have strongly supported the assessee's evidence that at the initial stage he did intend to retain lots 1 and 2.

Another matter dealt with in the Board's decision has also formed the subject of complaint. The assessee had maintained that from the start he had two purposes in view—(1) to retain fields 1, 2, and 5 and (2) to dispose of the remainder of the estate. In support of the second limb of his intention he said that, even prior to making the first offer, he had been in contact with the Muslim people who ultimately bought the other fields. The Board, in reaching its conclusion that the assessee had no intention to retain any part of the land, also took the view that negotiations with the Muslim purchasers only took place after 1.10.1954 when the first offer was made. In fact there is some support for this view from the evidence of the proctor who acted both for the assessee and the Muslim purchasers. But in any event I see no great justification in the complaint that the Board wrongly thought that negotiations with the Muslim purchasers had not taken place before the offer made to the proprietors of Belwood Estate. The mere fact that any such early negotiation covered only a considerable part of the land, and not its entirety, is of no great assistance in considering whether, having regard to all the proved facts, the assessee's intention was either to sell the entirety as soon as possible or else to retain some acres for himself. Even if the evidence of these prior negotiations had been accepted, all it would have served to establish conclusively was that the first offer was made in the expectation that a large part of the estate could be sold to the people who ultimately did purchase it.

Counsel for the assessee claimed that the Board of Review wrongly drew the inference that the assessee did in fact intend to sell up the estate in lots, and some of the grounds upon which that claim is based have been set out above. There thus arises for consideration the scope and nature of the power which this court has, upon a Case Stated, to reject conclusions reached by the Board on questions of fact. I have in this connection derived valuable aid from a judgment of the Supreme Court of India in *Naidu & Co. v. The Commissioner of Income Tax* [1] which dealt with the corresponding functions of the High Court in India upon references of questions of law under section 66 of the India Income Tax Act, 1922. No excuse is necessary for citing at some length from that judgment observations which analyse the problems which can arise and distinguish lucidly between the different courses open to the court

[1] *1959 A. I. R. 359 (S. C.)*

in different situations. What appears specially pertinent to the consideration of the arguments now urged on behalf of the assessee I have italicized in citing from the judgment of Gajendragadkar, J. :—

"There is no doubt that the jurisdiction conferred on the High Court by section 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 section 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 section 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 has 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."

(*at pp. 362 and 363*)

It would seem following these *dicta*, with which I most respectfully agree, that it is open to this court to reconsider the correctness of the inference drawn by the Board of Review as to the assessee's intention, only—(*a*) if that inference has been drawn on a consideration of inadmissible evidence, or after excluding admissible and relevant evidence,

(*b*) if the inference was a conclusion of fact drawn by the Board but unsupported by legal evidence, or

(*c*) if the conclusion drawn from relevant facts is not rationally possible, and is perverse and should therefore be set aside.

The first of these conditions does not exist in the present case. The Board of Review neither considered inadmissible evidence nor excluded admissible and relevant evidence. It entertained the evidence of the two proctors and stated that it had considered that evidence ; and unless it appears to this court that acceptance of that evidence must necessarily have negatived the intention which the Board of Review attributed to the assessee, it cannot be said that the omission to make express reference to the significance, if any, of the evidence amounted to the exclusion of relevant evidence. The second condition certainly is not present, for my opinion will presently be stated that there is ample legal evidence to support the inference drawn by the Board of Review. Even more untenable would be the plea that the conclusion of the Board is not rationally possible and was therefore perverse.

The " picture " presented by the various transactions detailed at the commencement of this judgment can fairly be described as follows. The assessee was in need of money well before he first decided to offer what was for him the mammoth sum of nearly 1½ million rupees for the purchase of Belwood Estate. Before making the offer he was indebted to Messrs. Shaw Wallace & Hedges in a sum of Rs. 130,000, which was nearly equivalent to the amount of the forfeitable deposit of 10 per cent. which he made in October 1954 with financial aid from Wijesinghe. Within nine days of his signing a firm agreement to purchase, he entered into an agreement by which Mohamed became bound to relieve him of more that half of his liability, Mohamed at that stage providing a cash deposit of more than half the amount which the assessee himself stood to lose if his own deposit became forfeit. Then, before he completed the purchase, he relieved himself of a further liability in a sum of Rs. 220,000 by the second agreement of sale on 31.12.1954, which now covered fields 3, 4, 6 to 10 and lot 112. His interest in persuading others to purchase these lots is manifested by the undertaking in the first of these agreements to procure finance to the extent of Rs. 300,000 for Mohamed. Further, on 31st December 1954, the assessee obtained, through the agreement to sell fields 1 and 2, an assurance of undeniable firmness covering a sum of Rs. 259,000, which was accompanied by a forfeitable cash deposit of Rs. 100,000. Indeed on 31st December 1954 the effect of all the transactions was that, although he had originally agreed to purchase 583 acres at an average price of Rs. 2,200 per acre,

the assessee in fact obtained title for himself and Wijesinghe only to 119 acres at an average price of just over Rs. 1,000 per acre. At this stage his total liability, which was for him the consideration for obtaining title to 119 acres, was only Rs. 125,000. But the result of the next transaction covering lot 5 was that the assessee was thereafter to retain only fields 11 and 12 which were of an extent of 62 acres. The assessee, when his expectation of Government acquisition of these fields became a reality, received a further Rs. 129,000, that is at the rate of about Rs. 2,000 per acre. His total nett gain from all the transactions was Rs. 144,000. The inference reached by the Board of Review, that the assessee purchased Belwood Estate with the intention to sell it in lots, was, having regard to the matters just mentioned, amply justified. Indeed it seems equally clear that, if the assessee had not entertained that intention, he would not have made his offer for the purchase of this estate. That he could *himself* pay the consideration of Rs. 1,300,000 before 1st January 1955 could not have been for him even a dream, since it would appear from the circumstances that even the initial deposit was paid with borrowed funds. The assessee could have had no hope whatever of completing the purchase except with funds obtained from persons desiring to buy large shares of the estate.

It is argued for the assessee that, in a case where a person is assessed to tax on the basis of an adventure in the nature of trade, the burden lies on the taxing authorities to establish that basis; and that, in order to do so, it must be shown not merely that the assessee hoped to make a profit and bought with that hope, but rather that his actual intention or dominant motive in making the purchase was to indulge in an adventure in the nature of trade. I readily agree with this argument. I adopt also the view expressed by Viscount Dunedin in the case of *Commrs. of Inland Revenue v. Livingstone*[1] that where there is an isolated transaction not in the course of the ordinary trade or business of the assessee "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 adventure in the nature of trade in respect of his investment, but *per se* it leads to no conclusion whatever".

In the present case I have already expressed agreement with the conclusion of the Board of Review as to the intention with which the assessee agreed to purchase Belwood Estate. The only question which remains is whether there are additional circumstances which, in conjunction with the proved existence of that intention, establish that the transaction was an adventure in the nature of trade. The relevant English decisions have been admirably analysed in the Indian judgment cited above, and it is fortunately unnecessary for me to attempt critical examination of those decisions. Many of them held that an individual who purchased land, albeit with the intention of reselling at a profit, had not in all the circumstances carried out "an adventure in the nature of trade". But the present case seems to me distinguishable,

[1] *1930 A. C. 415.*

at least in regard to the major part of the transactions, on the ground that in regard to that major part there was in fact no purchase by the assessee. In pursuance of the intention, which the Board rightly in my opinion attributed to him, he *agreed to purchase* 583 acres but in fact he ultimately purchased for himself on 31st December 1954 only 119 acres. The *dictum* of Viscount Dunedin cited above refers to the intention not to "hold an investment", but the assessee here certainly made no "investment" whatever covering the 400 odd acres which constituted the fields actually sold to others on 31st December 1954, or covered by firm sale agreements. With regard to these fields the option to purchase which he secured from the proprietors of the estate enabled him to make his profit without himself "investing" anything more than the initial deposit which he had made in October 1954, far more than half of which had been "covered" by Mohamed's deposit itself. If, as I think, there was never an intention to obtain in his own name title to the major part of the estate, then there was certainly an adventure or speculation, not with a view to investing in land, but with a view to exploit the option by the sale of large portions to other buyers. In this view of the matter it seems that the real question might be only whether, in regard to the 119 acres to which the assessee actually got title, it should be said that this part of the transaction was also an adventure in the nature of trade. As to this land, comprising fields 5, 11 and 12, the admission by the assessee and by Wijesinghe that they knew beforehand that the Government contemplated acquisition of a part of the land, and the agreement in February 1955 to sell field 5, again justified the inference that there was no intention to hold the land as an investment. One transaction to which I have not referred in the summary given at the commencement of this judgment was a mortgage by the assessee to Wijesinghe of all his interests for a sum of Rs. 100,000. This mortgage shows that even the consideration for which the assessee apparently purchased the fields was provided only through financial assistance from Wijesinghe and not out of funds available in the hands of the assessee himself. The mortgage of 31.12.1954 in favour of Messrs. Keil and Waldock was apparently one under which the assessee bound himself to deliver the crop to the mortgagees, a point which establishes the untruthfulness of the assessee's allegation that he wished to use the leaf for his own tea factory. The circumstances in their entirety lead strongly to the conclusion that these 119 acres were retained by the assessee only because the purchase had to be completed before 1st January 1955 and no outside buyers had been actually procured by that time.

The assessee had contended before the Board of Review that in determining whether the transactions constituted an adventure in the nature of trade, the test laid down in the English case of *Leeming v. Jones* [1] must be applied and that the Revenue must accordingly show that there

[1] *1930 A. C. 415.*

were present such elements as (*a*) an " organisation " akin to one ordinarily engaged in trade of the nature alleged, (*b*) work done in maturing the asset to be sold and (*c*) special skill possessed by the assessee and utilised for the purposes of the transaction. And before us it was argued that there was no evidence before the Board to justify the conclusion that these elements had been present. But even if I assume that the particular matters to which the Board refers in this connection do not directly support the findings that all these elements were present, the House of Lords indicated in the more recent case of *Edwards v. Banstow* [1] that one need not necessarily look in one case for the presence of the precise elements which had in a previous case influenced a conclusion in favour of the Revenue. In reversing the finding of fact reached by the Commissioners in that case, and in holding that the only reasonable conclusion was that there had been an adventure in the nature of trade, Lord Radcliffe (at *page 36*) used language which can without difficulty be adapted to the proved circumstances of the case before us. And with much respect, I shall attempt such an adaptation :—

Here are two persons (the assessee and Wijesinghe) who put up money to acquiring an option to purchase a large estate of 583 acres of cultivated land, paying a cash deposit as a forfeitable advance, and agreeing to complete the purchase within a few weeks. They have neither intention nor financial capacity to pay the large purchase price from funds either held by them or to be borrowed for the purpose, so they do not secure the option in order to purchase the estate for themselves. On the contrary, their intention, and the only practical course open, is to dispose of the estate, or as much of the land as possible, to others, *before* they exercise the option. Indeed, if they fail to find buyers for the major part of the estate before D Day, their deposit will be forfeit. They in fact very soon secure purchasers for extents aggregating 464 acres at a price well above the average contract price per acre. They themselves ultimately purchase only what remains at an advantageous price, but the assessee's share even of this amount is in all probability paid with moneys obtained from mortgages of his interest in the land. Very shortly thereafter, they sell about half of this remaining 119 acres, and what is outstanding is acquired by the Government—an acquisition which they had anticipated when they acquired their option. And as they hoped and expected they make a nett profit on the deal, enjoying the additional good fortune that they did not need the assistance of brokers or advertisement in order to carry it through. What else is this, but a deal in land, a successful commercial speculation ?

It has been remarked that in a case such as this there are no hard and fast rules governing the construction of a particular transaction or set of transactions, and that each case has to be considered in the light of its special circumstances. In the language of the Supreme Court of

[1] *1956 A. C. 114.*

India in another more recent judgment in *Saroj Kumar v. Income Tax Commr.*[1] the total impression created in my mind in all the circumstances of the case is that the assessee's dominant intention when he entered into the agreement to purchase Belwood Estate was to embark on a venture in the nature of trade. I would accordingly answer in the affirmative the question of law as stated at the commencement of this judgment.

The Applicant will pay Rs. 500 to the respondent as costs.

HERAT, J.—I agree.

Appeal dismissed.