

1962 Present : L. B. de Silva, J., and Sri Skanda Rajah, J.

H. V. RAM ISWARA, Appellant, and COMMISSIONER OF
INLAND REVENUE, Respondent

S. C. 3 of 1962—Income Tax Case Stated BRA/303

Income Tax Ordinance—Section 6 (1) (a)—Case stated—Power of Supreme Court to examine questions of mixed law and fact—Meaning of “an adventure or concern in the nature of trade”.

In a case stated by the Board of Review under section 78 of the Income Tax Ordinance it is open to the Supreme Court to reject a conclusion reached by the Board on a question of mixed law and fact. In such a case, the Court would have to accept the findings of the Board on the primary questions of fact, but it can examine whether the Board has applied the relevant legal principles correctly or not.

The assessee's wife bought a land ostensibly for the purpose of building on it a house for her own use and occupation. She divided the land into 14 separate lots and disposed of 13 of them at such prices that she was able to get the 14th lot (70 perches in extent) for her own self for only Rs. 15,275 when its market value was Rs. 87,040. Before the authorised adjudicator it was agreed that the nett profit made by her out of the transaction was Rs. 66,331. The Board of Review decided, on the evidence, that the transaction was an adventure or concern in the nature of trade within the meaning of section 6 (1) (a) of the Income Tax Ordinance.

Held, that, as a question of mixed law and fact was involved, it was open to the Supreme Court to examine whether the Board of Review applied the relevant legal principles correctly or not. Even an isolated transaction can satisfy the description of an adventure in the nature of trade. Each case must, however, be determined on the total impression created on the mind of the Court by all the facts and circumstances disclosed in the particular case.

CASE stated under section 78 of the Income Tax Ordinance.

H. V. Perera, Q.C., with *S. Ambalavanar* and *M. Amarasingham*, for the assessee-appellant.

A. C. Alles, Solicitor-General, with *H. L. de Silva*, Crown Counsel, and *Shiva Pasupati*, Crown Counsel, for the Commissioner of Inland Revenue, respondent.

Cur. adv. vult.

November 13, 1962. SRI SKANDA RAJAH, J.—

This is a Case Stated by the Board of Review under Section 78 of the Income Tax Ordinance at the request of the Assessee-appellant, whose communication is mentioned in the reference as X2. This communication does not correctly set out the question submitted for the opinion of this Court. The actual question we are called upon to consider is “whether, on the facts and circumstances proved in the case, the inference that the transaction in question was *an adventure or concern in the nature of trade* is in law justified.”

The facts as found by the Board of Review are: the assessee, who is a Proctor and Notary, was at one time living with his wife and five daughters in a rented house at Hultsdorf. Four of their five daughters were attending the St. Bridget's Convent. His wife made inquiries from brokers, who came to the assessee's office, for the purchase of a building site close to St. Bridget's Convent. A broker named Boteju offered for sale a land in extent 433 perches situated in Alexandra Place and adjoining St. Bridget's Convent. The owner of the land Mrs. Thambyah was willing to sell this land only to a person buying the entirety. This offer was, however, turned down as the land was very much in excess of her requirements and she did not have the money to pay the price demanded. Sometime later, by deed No. 3684 of 3.3.51, attested by the assessee himself, his wife, whose address is given in this deed as “Soma Siri”, Kalubowila Road, Dehiwala, an agreement was entered into between the Assessee's wife and Mrs. Thambyah for the former to purchase the land for Rs. 450,000 and the former deposited a sum of Rs. 45,000. It was agreed, *inter alia*, that Mrs. Thambyah would convey the land to Mrs. Ram Iswara (the assessee's wife) or her nominees on payment of the balance sum of Rs. 405,000. If Mrs. Ram Iswara failed to pay this sum on or before 20.4.1951 and obtain a conveyance, the sum of Rs. 45,000 paid as deposit would be forfeited by way of liquidated damages. Mrs. Ram Iswara would reconvey to Mrs. Thambyah a divided portion out of the land in extent 60 perches and Mrs. Ram Iswara would allow Mrs. Thambyah a right of user of a

roadway to that divided portion. Mrs. Ram Iswara would have the roadway approved by the Municipal Council and constructed at her own expense. Mrs. Ram Iswara had to borrow the Rs. 45,000 to make the deposit. She had a house in McCarthy Road, another at Wellawatte and a third in Hultsdorf. They could not be sold as vacant possession could not be obtained. Soon after the agreement, and within nine days of it (i.e. before 12.3.1951), a sketch had been prepared showing a division of the land into fourteen lots—twelve building sites and two roadways—to be shown to prospective purchasers. A survey was made on 29.3.51 dividing the property according to the sketch. On 18.4.1951 Mrs. Thambyah conveyed three lots (A in extent 40 perches, B in extent 30 perches, C in extent 60 perches) and the road reservations (N and O) to Mrs. Ram Isawara for Rs. 78,525. The deposit of Rs. 45,000 was set off against this sum and only the balance Rs. 33,525 was paid. Lot C was reconveyed to Mrs. Thambyah. The other nine building sites were conveyed by Mrs. Thambyah to Mrs. Ram Iswara's nominees for a total sum of Rs. 434,725, i.e. only Rs. 15,275 less than the price of Rs. 450,000 agreed upon for the entire land of 433 perches. Thus Mrs. Ram Iswara was able to get 70 perches of this valuable land in the coveted residential area of Cinnamon Gardens for only Rs. 15,275, whereas the market value was Rs. 87,040. But, before the authorised adjudicator it was agreed that the nett profit made by Mrs. Ram Iswara out of this transaction was Rs. 66,331.

Both parties rely on the findings of the Board of Review on the facts.

The Board of Review has accepted the contention of the Department of Inland Revenue that this transaction was an adventure or concern in the nature of trade within the meaning of Section 6 (1) (a) of the Income Tax Ordinance.

Counsel for the assessee has submitted that the dominant intention of the assessee's wife was to find a residence near St. Bridget's Convent. This question was considered with great care by the Board of Review, who have rejected this submission and come to the conclusion that the dominant intention connotes an adventure in the nature of trade.

We are indebted to both Counsel for the able manner in which the arguments were presented and for the citations.

The learned Solicitor-General cited the case of *Naidu & Co. v. The Commissioner of Income Tax*¹ and drew our attention to a passage at pages 362 and 363 in the judgment of Gajendragadkar, J., which, if I may so with great respect, admirably sets down the scope and the nature of the power which this Court has, upon a Case Stated, to reject conclusions reached by the Board of Review on questions of fact and on questions of mixed law and fact. Though the passage in question has been quoted by my Brother, H. N. G. Fernando, in the case of *Mahawithana v. Commissioner of Inland Revenue*², I consider it necessary.

¹ 1959 A. I. R. 359 (S.C.).

² (1962) 64 N. L. R. 217.

to set it down in this case too italicising the portion relevant for the consideration of the arguments in this case, which are based on questions of mixed law and fact unlike the 64 N. L. R. 217 case :—

“ 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 the same case 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 (i). 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 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 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 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 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 inquiry 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.*”

In this case, as mentioned earlier, the assessee challenges the correctness of the conclusion reached by the Board of Review on the basis that it is a conclusion on a question of mixed law and fact. Therefore, as indicated in the passage italicized above, we have to examine whether the Board of Review has applied the relevant legal principles correctly or not.

The same Judge expressed himself as follows at page 364, "It is patent that the clause 'adventure 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".

At p. 366 he said "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 all of them; and so, even an isolated transaction can satisfy the description of an adventure in the nature of trade."

In that case it was also indicated: "It is, however, impossible to evolve any formula which can be applied in determining the character of isolated transactions which come before the Courts in tax proceedings. The decision about the character of a transaction in the context cannot be based solely on the application of any abstract rule or test and must in every case depend upon all the relevant facts and circumstances. It would besides be inexpedient to make any attempt to evolve such a rule or formula. In each case, it is the total effect of all relevant factors and circumstances that determine the character of the transaction; and so, though the Court may attempt to derive some assistance from decisions bearing on this point, it cannot seek to deduce any rule from them and mechanically apply it to the facts before it".

In the case of *Edwards v. Bairstow*¹ Viscount Simonds expressed himself as follows:—"If it is a characteristic of an adventure in the nature of trade that there should be an 'organisation' I find that characteristic present here I find 'activities which led to the maturing of the asset to be sold' and the search for opportunities for its sale, and conspicuously, I find that the nature of the asset lent itself to commercial transactions."

In the case of *Saroj Kumar Mazumdar v. Commissioner of Income Tax*² following 1959 A. I. R. 359 it was held that no general principles or universal tests could be laid down. Each case must be determined on the total impression created on the mind of the Court by all the facts and circumstances disclosed in the particular case.

The facts accepted by the Board of Review establish that—

1. The assessee or his wife had no money to pay even the deposit. That sum had to be borrowed.
2. The transaction had to be concluded between 3.3.51 and 20.4.51, a comparatively short period of time.

¹ 1956 A. C. 14 at 29.

² 1959 A. I. R. 1252 (S.C.).

3. There was preparation, organization and activity: within a few days of the agreement of 3.3.51 a sketch was prepared to be shown to prospective purchasers. Soon thereafter a survey plan was made dividing the land into 14 lots, twelve building sites and two roadways, i. e., the activity led to the maturing of the assets.

4. The quantity or extent purchased was far in excess of the alleged requirements of the assessee's wife.

5. There was considerable profit from the transaction within a short time, i. e., the presence of profit motive, which is a characteristic of trade.

What is the "total impression" or "picture" that these facts would leave on the mind of any reasonable person? Having considered all these matters in conjunction with the evidence that Mrs. Ram Iswara had a desire to live near St. Bridget's Convent for the sake of education of the four girls attending that institution the Board of Review arrived at the conclusion that the dominant motive or intention was not the desire of hers and that the transaction presented a "picture" of an adventure in the nature of trade.

When learned Counsel for the assessee-appellant was reading paragraph 8 of the case stated I asked him if it was Mrs. Ram Iswara's dominant desire to live near St. Bridget's Convent for educating her daughters why she had shifted from Hulstdorp to Dehiwela before 3.3.1951, the date of the agreement, i. e., further away from St. Bridget's Convent than Hulstdorp, and he ventured the explanation that she may have been at Dehiwela temporarily and the Notary might have been under the impression that he should give that address. But, later on I pointed out that it was the assessee himself, her husband, a Proctor and Notary, who attested that agreement. If Mrs. Ram Iswara was residing only temporarily at Dehiwela that fact would have been known to the assessee and he would not have given that as her address in the agreement. Also there is no indication of any attempt being made at any time to eject the tenant from the house in McCarthy Road, which is also in Cinnamon Gardens and near St. Bridget's Convent. One would expect that to be done if the dominant motive or intention was that alleged by the assessee.

These circumstances also go to support the finding of the Board of Review, whose order indicates that they have applied the relevant legal principles correctly.

For these reasons, I would answer the question submitted for our consideration in the affirmative.

The Assessee-Appellant will pay Rs. 750 to the respondent as costs.

L. B. DE SILVA, J.—I agree.

Appeal dismissed.