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the railway administration is entitled by virtue of the approval of the form under these circumstances by the Central Government to obtain a risk note in form 'X'. In the present case, therefore, in my opinion, the railway administration was perfectly entitled to obtain a risk note in the form in which they did and the railway administration has fully protected itself by this note.

I agree with the order proposed by my Lord the Chief Justice and I also join in the recommendation that Government will consider the case of the appellant from the point of view indicated in the judgment of my Lord the Chief Justice.

P. C.—Liberty to the appellant to withdraw the sum of Rs. 500 deposited for security of costs.

Attorneys for appellant: *Raghavayya, Nagindas & Co.*

Attorneys for respondent: *Little & Co.*

Appeal dismissed.

P. M. P.

INCOME-TAX REFERENCE

Before Mr. M. C. Chagla, Chief Justice, Mr. Justice Dixit and Mr. Justice Tendolkar.

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RAJPUTANA TEXTILES (AGENCIES) LIMITED, APPLICANTS *v.* THE COMMISSIONER OF INCOME-TAX, BOMBAY CITY, RESPONDENT.*

Taxation of Income (Investigation Commission) Act, (XXX of 1947) s. 8 (5)—Indian Income-tax Act (XI of 1922), s. 66 (1)—Single transaction of purchase and sale of shares—When such transaction is an adventure in the nature of trade.

Even a single transaction of purchase and sale of shares could be regarded as an adventure in the nature of trade if there is some element of trade attaching to the transaction and there is found in that transaction some activity or some organization which is associated with trade or trading.

R. T., the assessee company, entered into an agreement to purchase 1976000 shares of certain Mills at Rs. 4/4 per share. Out of these shares, R. T. sold 1374000 shares and made a profit of Rs. 13,52,600. This was the only transaction of purchase and sale of shares which it had entered into. It had neither utilized its own capital nor borrowed any capital for

*Income-tax Reference No. 31 of 1951.

the purchase of the shares. It had from the outset no intention to retain 1374000 shares and had entered into agreements with several brokers for sale of these shares at higher rates even when negotiations for the purchase of 1976000 shares were going on. The Income-tax Investigation Commission to whom the assessee company's case was referred found on these facts that the transaction of purchase and sale of 1374000 shares was an adventure in the nature of trade and the profits arising out of the transaction were taxable. On reference to the High Court on the question whether there were materials to justify the finding of the Commissioners,

Held, that there was evidence to justify the finding of the Income-tax Investigation Commission that the transaction of purchase and sale of 1374000 shares was an adventure in the nature of trade.

Lacming v. *Jones*[1], *Radha Debi Jalan* v. *Commissioner of Income-tax Calcutta*,[2] *California Copper Syndicate* v. *Harris*[3] *Commissioner of Income-tax, C. P. and U. P.* v. *Motiram Nandram*[4] and *Tata Hydro-Electric Agencies, Ltd.* v. *Commissioner of Income-tax, Bombay*,[5] referred to

Facts material to this Report appear in the Judgment.

At the instance of the assessee Company the Commissioner of Income-tax referred the following question to the High Court:—

"Whether on the facts found by the Commission, the sum of Rs. 16,52,600 being the excess price realised by the sale of 1374000 shares of the Mill Company, was 'profit' and as such taxable or whether it was either of the nature of a capital appreciation or a casual and non-recurring receipt and as such exempt from taxation under s. 4 (3) (*vii*) of the Income-tax Act?"*

N. A. Palkhivala, with *Sir Jamshedji B. Kanga* and *Y. P. Pandit,* for the applicants.

Sir Nusserwanji P. Engineer, with *G. N. Joshi,* for the respondent.

Chagla C. J.—A question of law has been referred to us by the Commissioner of Income Tax under s. 8 (5) of the Taxation on Income (Investigation Commission), Act, 1947, read with s. 66 (*1*) of the Indian Income Tax Act, 1922, which arises out of the report of the Income Tax Investigation Commission.

The assessee company was incorporated on May 6, 1943. Its capital was a paid up capital of Rs. 20 lacs divided into 2,000

* The High Court re-framed the question as follows:—

"Whether there were materials to justify the finding of the Commission that the transaction of purchase and sale of 1374000 shares was an adventure in the nature of trade."

[1] (1930) 15 T.C. 333.
[2] [1951] 20 I. T. R. 176.
[3] (1904) 5 T. C. 159.
[4] [1939] 8 I. T. R. 132,
[5] [1937] 5 I. T. R. 202.

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ordinary shares of Rs. 1,000 each. Before its incorporation the promoters of the assessee company entered into an agreement with M/s. E. D. Sassoon & Co. Ltd., who were the managing agents of the Apollo Mills Ltd. Under this agreement the Sassoon Co. agreed to sell to the promoters the managing agency of the Apollo Mills for Rs. 12½ lacs and also agreed to sell 19,76,000 shares of the Apollo Mills at the price of Rs. 4-4-0 per share, the total purchase price being Rs. 83,98,000 for the shares. The agreement also provided that the sale and transfer of the managing agency and the sale of the shares shall be completed simultaneously and the transaction with regard to the managing agency and the shares should be considered as one transaction, and neither the vendor nor the purchaser would be entitled to call for the completion of or be bound to complete the sale of the one without the other. The letter which records this agreement also states that the promoters proposed to form a registered limited company to take over the managing agency, and the Sassoon Co. agreed, if a limited company with a subscribed capital of Rs. 20 lacs was formed, to transfer the managing agency to such limited company. The assessee company sold 13,74,000 shares out of the shares that were purchased from the Sassoon Co. and in selling the shares the assessee company made a profit of Rs. 16,52,600. The balance of the shares, about 6,01,600, were retained by the assessee company. A formal tripartite agreement was entered into on November 1, 1943, between the E. D. Sassoon Co., the promoters and the assessee company, and under this agreement the managing agency was transferred to the assessee company and the agreement also records the fact that the shares had been delivered to the assessee company.

The question that arises for our determination is whether the profit made by the assessee company by the sale of 13,74,000 shares, viz. Rs. 16,52,600, is taxable. The question that has been submitted to us is in this form:

> "Whether, on the facts found by the Commission, the sum of Rs. 16,52,600 being the excess price realised by the sale of 1374000 shares of the Mill company, was profit and as such taxable or whether it was either of the nature of a capital appreciation or a casual and non-recurring receipt and as such exempt from taxation under s. 4 (*3*) (*vii*) of the Income Tax Act."

One of the facts found by the Tribunal is that the transaction of purchase and sale was an adventure in the nature of trade. If that is the fact found, then on that fact only one conclusion can arise and that is that the profit made by the assessee com-

pany is a taxable profit. In our opinion the real controversy between the parties is whether the transaction of purchase and sale of these shares by the assessee company was an adventure in the nature of trade, and, therefore, we are of the opinion that the question submitted to us should be reformulated in order properly to bring out the controversy between the assessee company and the revenue authorities. In order to decide whether this transaction was an adventure in the nature of trade or not, certain significant facts found by the Tribunal must be referred to. It has been found that the assessee company neither utilised its own capital nor borrowed any capital for the purchase of those shares. As it has been pointed out, the capital of the assessee company was Rs. 20 lacs and that was hardly sufficient to meet the cost of purchasing the managing agency which was Rs. 12½ lacs and the cost of 6 lacs shares which the assessee company purchased and retained. It has also been found as a fact that negotiations for the sale of these 13 lacs shares commenced before the agreement was entered into between the promoters and the E. D. Sassoon Co. In other words, the assessee company from the very inception had no intention to retain these 13 lacs shares. The intention from the very commencement was to resell these shares at a profit. It has also been found as a fact that these shares were sold in the ordinary way. Agreements were entered into with five brokers for the sale of 10 lacs of shares and for the balance other brokers were engaged. It is also a rather significant fact that these shares were sold to the assessee company at the rate of Rs. 4-4-0 per share and the agreement to sell these shares which was entered into with the various brokers was at the rate varying between Rs. 5-8-0 and Rs. 5-13-0 per share. The Tribunal has also found as a fact on which considerable reliance has been placed by the assessee company that the principal object of the promoters was to acquire the managing agency of the Apollo Mills.

On these facts the question that we have to consider and decide is whether the purchase and sale by the assessee company of 13 lacs shares of the Apollo Mills was an adventure in the nature of trade. It is not disputed that this is the only transaction which the assessee company has entered into of purchase and sale of shares. Therefore, we are dealing with an isolated transaction. We are not dealing with a business carried on by the assessee, but we are dealing with the profits which arise out of a single transaction entered into by the assessee company. The profits which arise out of an isolated transaction

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may or may not be taxable. They would only be taxable if the isolated transaction is an adventure in the nature of trade. There must be some element of trade attaching to that transaction; there must be some activity or some organisation which one associates with trade or trading. There may be profit made by purchase and sale which would obviously not be in the nature of profit made from an adventure in the nature of trade. A lawyer, for instance, may buy and sell shares investing his income in this transaction. His object may be capital appreciation and he may realise the capital appreciation by the sale of shares. But mere capital appreciation and profits arising out of capital appreciation would not constitute taxable profits because they would not arise out of a transaction which is an adventure in the nature of trade. Or a person may buy an object of art, he may have the intention of selling that object of art if the price of that object goes up, and when he sells it he may make profit. This may not be a case of capital appreciation. It may be a case of casual receipt or casual gain. Neither the one nor the other would be taxable. Therefore, when we are dealing with an isolated transaction, what is essential to find is whether the transaction is an adventure in the nature of trade. A continuous business requires more activity and greater organization. A single transaction would not require the same amount of activity or the same nature of organization. But even so, we must find some features of business in the transaction we are dealing with before we can call that transaction an adventure in the nature of trade. In this particular case no question of capital appreciation can possibly arise because no part of the capital of the assessee company was invested in the purchase of these shares, and, what is even more important, these shares never formed part of the capital of the assessee company. The intention, as has already been pointed out, from the very start was to dispose of these 13 lacs shares at a profit. It is also clear that the shares were purchased and sold as they would be sold by any trader trading in shares. Brokers were employed, negotiations were carried on, prices were fixed, profit was realised, and the same activity and the same organization was apparent as would have been apparent if the assessee company was trading or doing business in the purchase and sale of shares. Therefore, it is equally clear that the profit made by the assessee company cannot be characterised as a casual receipt arising out of a single transaction to which is not attached any of the attributes of a trade or business.

Now, when we turn to the authorities on this aspect of the case on which Mr. Palkhivala has relied, the one fact which clearly emerges is that it is difficult and not desirable either to apply one case to another case where the facts and the circumstances are different. As we shall presently point out, the question whether a transaction is an adventure in the nature of trade is essentially a question of fact. That fact has to be ascertained from all the circumstances in the case, and the question of law that can only arise when a Tribunal has ascertained the fact is whether there was evidence to justify the finding of fact. If there was evidence, no question of law arises, but if the assessee can satisfy the Court that the Tribunal came to that conclusion of fact on no evidence or on inferences which are entirely unreasonable, then the Court would interfere and the interference would be limited to this that the evidence recorded and disclosed on the record was not such as could possibly warrant the inference drawn by the Tribunal. Therefore, in this case we start with this that the Investigation Commission has found as a fact that the purchase and sale by the assessee company of these 13 lacs shares was an adventure in the nature of trade. That is a finding of fact which we must accept, and the only right that the assessee has before us is to challenge that finding of fact on the ground that there were no materials before the Tribunal to justify it in arriving at that conclusion. Apart from authorities, to which we shall presently refer, it is difficult to understand how, in a case like this where the Tribunal in a very careful judgment has drawn attention to several circumstances and a large volume of evidence which has led the Tribunal to the conclusion that this transaction was an adventure in the nature of trade, it is open to the assessee to suggest that there was a complete absence of evidence and a complete absence of materials and, therefore, we in our advisory jurisdiction should interfere with the finding of fact arrived at by the Tribunal. It is unnecessary to repeat that this Court is not concerned with the quality of the evidence led before the Tribunal, nor is it concerned with the adequacy of evidence led before the Tribunal. Whether the evidence was sufficient or not is again for the Tribunal to decide. Our jurisdiction can only be invoked if there was no evidence at all which would justify the finding. If there was even some evidence we must accept the decision of the Tribunal as a correct decision on facts.

The leading case on which Mr. Palkhivala has placed very strong reliance is a decision of the House of Lords in *Leeming*

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v. *Jones*.[1] In that case the assessee was a member of a syndicate and that syndicate purchased two options over two rubber estates and the rubber estates were ultimately sold to a limited company and the syndicate made a profit and the assessee was given his share of the profit, and the question that arose was whether his share was liable to tax as profit arising out of business. The General Commissioners were of the opinion that the assessee had acquired interest in the property 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, and, therefore, they confirmed the assessment. The matter came before Mr. Justice Rowlatt and Mr. Justice Rowlatt remanded the matter to the Commissioners asking them to find whether what they had before them was a concern in the nature of trade. The learned Judge points out that all that the Commissioners 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 the property as an investment, and the learned Judge says that that may not be sufficient to arrive at the conclusion that the assessee was carrying on a trade, and he asked 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 had considered all that to say whether they think it was an adventure in the nature of trade or not. On the remand the Commissioners held that the transaction in question was not a concern in the nature of trade, and this finding of fact was accepted both by the Court of Appeal and by the House of Lords, and Lord Thankerton at p. 363 in terms states:

> "I agree with the view taken in both the Courts below that the finding was a finding of fact which excludes the application of Case I of Schedule D",

that being the case in which the taxing authorities contended the case of the assessee fell. The rest of the decision of the House of Lords was concerned with the question as to whether the case of the assessee fell in Case VI which dealt with any annual profits or gains not falling under any of the foregoing Cases and not charged by virtue of any other Schedule. Lord Buckmaster in his judgment points out (p. 357):

> "An accretion to capital does not become income merely because the original capital was invested in the hope and expectation that it would rise in value; if it does so rise, its realisation does not make it income."

[1] (1930) 15 T. C. 333.

And Lord Dunedin at p. 360 states:

"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 investments but *per se* it leads to no conclusion whatsoever."

Mr. Palkhivala says that this decision clearly lays down that if an assessee buys an article or an object with the intention of reselling it, that fact does not constitute the transaction on adventure in the nature of trade, and Mr. Palkhivala says that because in this case the assessee company purchased 13 lacs shares with the intention of reselling them that intention did not make the transaction of purchase and sale an adventure in the nature of trade. Now, all that this case emphasises is that where you have a purchase and the only fact found is that the purchaser had the intention of reselling the shares and to make a profit by resale, that is not sufficient to warrant a conclusion that that particular transaction was an adventure in the nature of trade. As Lord Buckmaster points out, it may be a case of realisation of capital appreciation. But the fact that there is the intention to resell is a material fact which may be taken into consideration along with the other facts. By itself it may not justify the inference that the transaction is in the nature of trade, but taken with other facts it would certainly be a very important and relevant fact. Mr. Palkhivala would have had some grievance if in this reference the Investigation Commission had held that the transaction by the assessee company of purchase and sale of 13 lacs shares was an adventure in the nature of trade merely because it had an intention of reselling those shares. But that is only one circumstance on which the commission has relied. There are several other circumstances which in conjunction with the circumstance just mentioned have led the Commission to the conclusion that this particular transaction was an adventure in the nature of trade.

The other case on which reliance has been placed is a judgment of the Calcutta High Court in *Radha Debi Jalan* v. *Commissioner of Income-tax*.[1] There a Hindu lady, wife of a member of an undivided family, owned a substantial number of shares in company H. That company was the managing agent of another company N and the N company transferred 48,000 of its shares to the assessee and other ladies of the family, the assessee getting 4,300 shares. They were transferred at the rate of Rs. 11 per share when the market price was Rs. 15-10-0

[1] (1951) 20 I. T. R. 176.

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per share and they were transferred in bank transfer forms. The shares were not registered till three years later, and two years later the assessee lady sold the 4,300 shares, and the question arose whether the assessee had dealt in shares and whether the profit made by her was taxable, and Mr. Justice Chakravarti and Mr. Justice Das Gupta held that the fact relied upon by the Tribunal, individually or taken together, did not furnish any evidence on which it could properly be held that the transaction of purchase and resale of the shares was itself an adventure in the nature of trade and therefore the profit was not taxable, and Mr. Justice Chakravarti in his judgment points out at p. 184 that in the case of a single transaction it must have some width of content and must comprise some activity in the nature of operations which are ordinarily followed in respect of trade, before that transaction could be treated as an adventure in the nature of trade, and he goes on to say:

"Instance of such operations would be, as has been pointed out in different cases, organizing sales of the commodity purchased or subjecting it to certain processes for the purpose of making it marketable."

The learned Judge further says (p. 184):

"It is true that the source need not be trade, but it must nevertheless be an adventure in the nature of trade, and if trade connotes or implies some continuous activity aimed at producing the profits, such activity must be found even in a case of adventure if the resultant profit is to be treated as taxable business income."

The learned Judge then enunciates the same principle as was enunciated by the House of Lords case referred to, and he enunciates the principle in these words: (p. 184)

"It is well settled now that the mere fact that a person purchases a commodity with the intention of reselling it at a profit does not by itself make the transaction of purchase and sale a trade. Such intention, however, is certainly an element to be borne in mind, but is not by itself decisive."

Then the learned Judge points out that in this case there were two significant features: One was that it was a lady who had purchased and sold these shares, and second that the number of shares purchased and sold were not very large; and attaching importance to those two circumstances and finding a complete absence of any activity or organization connected with the purchase or sale of these shares, the Court came to the conclusion that this was not a transaction which could be considered to be an adventure in the nature of trade. The Court was at pains further to point out that if the High Court could hold

that there was evidence before the Tribunal on which it could properly take the view that profits had been derived from the adventure in the nature of trade, it would not be entitled to say that the Tribunal was wrong although there might be other evidence pointing to the opposite direction. Now, it is difficult to see how this decision can possibly help the assessee in this case. We are neither dealing here with a lady, nor are we dealing with a purchase or sale of a small number of shares. We are dealing with a case where an assessee company has purchased a large number of shares, an assessee company which had made up its mind to sell those shares before the contract of purchase had gone through, and we are dealing with a case where several brokers were employed to enter into transactions of sale and where the profit was made certain before even the shares were purchased.

The next case on this branch of the argument to which reference might be made is another decision of the English Court in *Californian Copper Syndicate* v. *Harris*,[1]. That case was of a company formed for the purpose of acquiring and reselling mining property and after acquiring and working various property, it resold the whole to a second company, receiving payment in fully paid shares of the latter company, and it was held that the difference between the purchase price and the value of the shares for which the property was exchanged was a profit assessable to income tax, and Lord Justice Clerk in delivering his judgment at p. 166 points out:

"It is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on or carrying out of a business."

Further, the question that the learned Lord Justice poses is: (p. 166)

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

Applying these tests to the facts of this case, it is clear that what the assessee company realised was not merely capital appreciation on its investment, but what it realised was by reason of the carrying on or carrying out of a business. Further, the whole of the transaction which we are considering was an operation of business in carrying out a scheme for profit-making. Mr. Palkhiwala says that there is no finding by

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

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the Commission that the object of buying these shares by the assessee company was to make profit. In our opinion that finding is implicit in the facts found by the Tribunal. The market price of these shares was about Rs. 6 per share; the assessee company was getting these shares at Rs. 4-4-0; before the contract was entered into it was made sure that the shares would be sold at a much higher rate and a profit was realised. What else is this transaction except an operation in business in carrying out a scheme for profit-making ?

Therefore, in our opinion, the assessee's contention is not sound when it has urged that the purchase and sale of these shares was an isolated transaction which was not an adventure in the nature of trade. All the facts and circumstances taken into consideration by the Commission fully justify the inference that the Commission has drawn that this was an adventure in the nature of trade.

The other contention put forward by Mr. Palkhiwala is that the assessee company wanted to buy the managing agency and to earn profits by being the managing agents of the Apollo Mills, and the purchase of the shares was an obligation attached to the purchase of the managing agency and without carrying out this obligation the assessee company could not have acquired the managing agency, and, therefore, says Mr. Palkhiwala, where you have to buy something or to acquire something not because you want to do so but because you are compelled to do so and because you want to acquire something else to make profits, then the acquisition or purchase of the former object is on capital account and not on revenue account. On a true construction of the agreement it would not be true to say that there was an obligation attached to the purchase of the managing agency, nor could it be said that the purchase of the shares was subsidiary to the purchase of the managing agency. The agreement between the promoters and E. D. Sassoon Co. was a composite agreement which dealt with the purchase and sale of two distinct and separate assets; the purchase and sale of the managing agency of the Appollo Mills and the purchase and sale of the shares of the Appollo Mills. To such an extent was the agreement composite and inter-connected that as already pointed out it was made an express stipulation that the managing agency could not be purchased or sold without the shares being purchased and sold, and therefore what the assessee company was doing was not merely buy-

ing the managing agency with an obligation which it was carrying out to purchase the shares for acquiring the managing agency, but what it was doing was to purchase the managing agency and also to purchase the shares.

The two cases, both of the Privy Council, on which Mr. Palkhiwala has relied deal with an entirely different subject-matter, and what the Privy Council was concerned with was to determine whether in each of those two cases a particular expenditure fell under s. 10 (2) (*xv*) of the Income Tax Act or s. 10 (2), (*ix*) as it then was. Under s. 10 (2) (*xv*), any expenditure laid out or expended wholly and exclusively for the purpose of a business, profession or vocation is a permissible deduction, but there is a qualification and the qualification is that the expenditure must not be in the nature of capital expenditure or personal expenses of the assessee. Therefore, before an assessee can claim a deduction, he must first satisfy the Court that it was an expenditure for the purpose of the business. But that is not enough. He must further satisfy the Court that the expenditure was not in the nature of a capital expenditure. It is difficult to understand how these totally different cases can have any bearing on the question that we have to consider, or how they can be of any assistance to the assessee. We are not dealing here with an expenditure made by the assessee company which is claimed to be a permissible deduction under s. 10 (2) (*xv*). We are dealing with a profit made by the assessee company, and the question of a profit can never be determined in the light of the provisions of s. 10 (2) (*xv*). When a profit is made, the only question to consider is whether it is a profit out of a business , or, if it is an isolated transaction whether it is a profit out of an adventure in the nature of trade. With these prefatory remarks we will look at the two judgments on which reliance has been placed.

The first is *Commissioner of Income Tax* v. *Motiram Nandram*,[1]. In that case the assessees were appointed the organizing agents of an oil company and in order to be so appointed they had to deposit with the oil company a sum of Rs. 50,000 which earned interest at 7 per cent. The deposit was to be returned after a certain lapse of time and part of the deposit was so returned, but before the whole of it could be returned the oil company went into liquidation and the assessees lost a substantial amount of the deposit and they claimed this amo-

[1] (1939) 8 I. T. R. 132.

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unt as loss in their business, and the question that the Privy Council had to consider was whether the deposit was a loan as urged by the assessees or it was a capital expenditure, and Sir George Rankin delivering the judgment of the Judicial Committee points out that (p. 138):

> "the Rs. 50,000 was doubtless laid out with a view to earning profits in the business of organizing agents in addition to the interest of 7 per cent, but it was not so laid down with reference to any particular transaction carried out in the course of such business."

Further (page 138):

> "The question in such a case as the present must be 'what is the object of the expenditure?" and it must be answered from the standpoint of the assessees at the time they made it, that *is*, when they were embarking upon the business of organizing agents for the company. The deposit was clearly exacted by the company as a condition of the assessees being given an agency which they hoped to manage profitably. Their Lordships think that the purpose of being permitted to engage in such a business must be considered to be a purpose of securing an enduring benefit of a capital nature, and that the deposit cannot, upon a true view of the terms of the agreement and the circumstances of the case, be regarded as an expenditure made in the course of carrying on an existing agency, or any other business."

Therefore the two facts found by their Lordships were, first, that this deposit was exacted from the assessees, and the second fact was that by making this deposit the assessees secured an asset of an enduring nature, in other words, it obtained capital asset. Now, neither of these two facts is present in the case before us. It is impossible to contend that when the assessee company bought the shares of the Apollo Mills it constituted an exaction. It would indeed be a curious meaning to give to the expression "exaction" if by buying these shares the assessee company only made a profit of Rs. 19 lacs. The transaction entered into by the assessee company was a purely voluntary transaction. It was open to them to buy the managing agency and the shares, or not to buy either. They bought the shares with their eyes open, with the full knowledge that that transaction would end in profits, and it is absurd for the assessee to say that there was any compulsion or exaction in the purchase of these shares. The second fact is also absent because by buying these shares the assessee company did not secure any enduring benefit of a capital nature except to the extent of shares of Rs. 6 lacs which were retained by the company and which constituted its capital. The rest of the shares, as already pointed out, never formed part of the capital of the company, and therefore the expenditure on the

shares did not result in any capital asset coming into existence. The shares were treated as if they were stock-in-trade of business and they were disposed of as if they were stock-in-trade.

The other case is a case reported in *Tata Hydro Electric Agencies Ltd.* v. *Commissioner of Income Tax*,[1]. In that case Tata Sons Ltd. were the managing agents of Tata Power Co. and two financiers advaned moneys to Tata Power Co. on condition that in addition to the interest payable to them by Tata Power Co. on the moneys advanced they would also receive from Tata Sons Ltd. 12½ per cent of the commission earned by them under their agency agreement with Tata Power Co. Later on Tata Sons Ltd. assigned their entire rights under the managing agency agreement to the assessees, the Tata Hydro Electric Agencies Ltd., and the Tata Hydro Electric Agencies entered into an identical agreement with the two financiers who had advanced moneys to Tata Power Co., and the question that arose was whether the assessee company was entitled to deduct from its income the 12½ per cent commission which it paid to the two financiers. Their Lordships of the Privy Council at p. 209 point out how difficult it is to discriminate between expenditure which is and expenditure which is not, incurred solely for the purpose of earning profits or gains. They point out that in the present case the expenditure was not made in the process of earning profits, and they come to the conclusion that the obligation to make these payments was undertaken by the assessees in consideration of their acquisition of the right and opportunity to earn profits, that is, of the right to conduct the business, and not for the purpose of producing profits in the conduct of the business. Mr. Palkhiwala says that the assessee company purchased these shares in order to acquire the right and opportunity to earn profits out of the managing agency and therefore this case falls within the principle of the Privy Council. The fallacy again underlying this argument is that we are not dealing with an expenditure which is sought to be deducted under s. 10 (2) (*xv*) of the Income Tax Act. The purchase of the shares, far from being an expenditure, was a source of handsome profit and as already pointed out it was a separate and independent transaction from the purchase of the managing agency, but the two were interconnected by reason of the agreement which compelled the purchaser to purchase both or neither and compelled the seller to sell both or neither.

[2] (1937) 5 I. T. R. 202.

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Chagla C. J.

It has been suggested in the course of the argument that the purchase of 19,76,000 shares constituted one transaction and the commission was in error in splitting up this transaction into two transactions and treating them separately. Now, it is not the Commission that has split up this transaction. It is the assessee company itself which has done so. The transaction with regard to 6 lacs shares and the transaction with regard to 13 lacs shares are entirely different. With regard to 6 lacs shares, as found by the Commission, the intention of the assessee company from the very start was to retain those shares in order to enable the assessee company to make effective use of its managing agency. Therefore the assessee company having purchased those shares treated those shares as its capital and the shares became a capital asset. With regard to the 13 lacs shares, there never being an intention to retain those shares and the intention being to resell those shares, those shares stood on an entirely different footing, and therefore in our opinion the Commission was fully justified in approaching these 13 lacs shares from a different angle from the approach it made to the 6 lacs shares.

It is finally urged by Mr. Palkhiwala that in any view of the case, the profits made by the sale of these shares cannot be taxed in the hands of the assessee company. A novel and a rather ingenious argument was put forward by Mr. Palkhiwala that the agreement to purchase the shares was entered into by the promoters, that the sales were effected by the promoters, that the company cannot adopt or ratify the contract made by the promoters, and therefore the transaction made by the promoters, and therefore the transaction in question was the transaction of the promoters and not of the company, and Mr. Palkhiwala went on to suggest that the promoters out of the generosity of their hearts made a gift of the small sum of 19 lacs to the company and therefore in any view of the case this gift which came into the coffers of the company was not liable to tax. It is clear from the report of the Commission that this point was never considered by it, nor has it expressed any opinion on the validity of the argument advanced by Mr. Palkhiwala. But Mr. Palkhiwala says that on the facts found this question of law arises and he is entitled to urge it. In our opinion it is not open to Mr. Palkhiwala to raise this contention. There is a clear recital in the tripartite agreement of November 1, 1943, that the 19 lacs shares of the Appollo Mills had been delivered to the assessee company and if the assessee company had chosen to agitate this point it could have

been easily ascertained why and under what circumstances these shares were delivered to the assessee company. Further it is clear from the record that the assessee company itself and all concerned throughout proceeded on the assumption that the income was sought to be taxed was the income of the assessee company and of no one else. The only question that arose for the consideration of the Commission was whether the income was taxable or not taxable. The question never arose as to whether the income was the income of the assessee company or the income of someone else. Therefore we have not permitted Mr. Palkhiwala to advance the argument that 19 lacs did not constitute the income of the assessee company but constituted the income of someone else and this income was gifted or transferred to the assessee company.

We will reformulate the question to read as follows:

"Whether there were materials to justify the finding of the Tribunal that the transaction of purchase and sale of Commission 13,74,000 shares was an adventure in the nature of trade ?."

and having reformulated the question we answer it in the affirmative.

There is a notice of motion taken out by the assessee company asking us to raise further questions. In our opinion the questions either do not arise out of the findings of the Commission or they are already dealt with in the question which we have considered on this reference and answered.

The result is that the assessee company must pay the cost of the reference and the costs of the notice of motion.

Attorneys for applicants: *Payne & Co.*

Attorneys for respondent: *N. K. Petigara.*

Answer accordingly

P. M. P.