Commissioner of Income Tax, Bombay

Vs

H. Holck Larsen

Civil Appeals Nos. 1954-55 (Nt) Of 1974 With Special Leave Petitions (Civil) Nos. 8292-8293 of 1979

(R. S. Pathak, Sabyasachi Mukharji JJ)

08.05.1986

JUDGMENT

SABYASACHI MUKHARJI, J. –

1. These appeals by certificate arise from the judgment and decision of the High Court of Bombay dated August 10, 1971, in Income Tax Reference No. 124 of 1963.

2. The question involved in these appeals is familiar in direct tax laws. The points in controversy are short. But the adjudication is pending for long. Assessment years involved are 1957-58 and 1958-59. The High Court disposed of these references on August 10, 1971 and in 1986 i.e. nearly after 28 years of the years of assessment we are posed with the question whether in respect of certain transactions in those years the assessee was a dealer or an investor and consequentially whether the income arising from the sale of shares by the assessee is to be taxed on revenue account or capital account.

3. The question that the High Court had to answer was as follows :

> Whether, on the facts and in the circumstances of the case, the assessee was a dealer in shares in the accounting periods relevant to the assessment years 1959-60 and 1960-61 ?

4. The said question was referred by the Tribunal to the High Court at the instance of the assessee.

5. The assessee, H. Holck Larsen, was a partner in the firm of M/s Larsen & Toubro (hereinafter referred to as the 'said company') up to 1946. On February 8, 1946/February 7, 1946, that partnership was converted into a private limited company of the same name. In consideration of his interest in the firm, the assessee was allotted shares of the company. Against payment of cash, the assessee got 1875 equity shares and against his interest in the partnership firm, he got 53,486 equity shares. During the next few accounting years up to the financial year 1953-54, the assessee acquired 2994 shares of the said company and sold 1550 shares. According to the statement of the case, the purchases and sales of shares of the said company were few and far between up to the financial year 1953-54, but these became larger in number and at close intervals in the next few succeeding years. The chart would indicate the position in this respect :

> #---------- (1) (2) (3) (4) (5)----------
> ----------Financial No. of shares Value No. of

shares Sale priceyear ending acquire (Rs) sold (Rs)----------March 31, 1955 .... 4,600 51,173March 31, 1956 6,111 61,110 13,955 1,88,433March 31, 1957 6,102 61,020 7,661 1,24,406March 31, 1958 1,256 12,560 5,050 63,721March 31, 1959 5,500 55,000 5,200 87,810March 31, 1960 11,000 1,11,000 10,400 2,45,732----------##

6. During the years mentioned in the chart, the assessee had acquired 29,969 shares of the said company and sold 37,366 shares thereby making a profit of Rs 1,65,581. Besides purchasing and selling equity shares of the said company, the assessee had also dealt in preference shares of the said company. The assessee had sold shares of Andhra Cement Co. in the financial year 1954-55, made purchases of shares of SCC and ICC in the years 1955-56, 1956-57 and 1958-59 and also of shares of India Cement Co. and National Carbon in 1955-56 and also sold shares of Guest Keen Williams and India Cement in 1958-59. During all these years the purchases and sales of equity shares of the said company were more marked than the purchase and sale of other shares. Besides the sale of equity shares of the said company and shares of other companies stated above, the assessee had also sold some of his original shares of the said company held by him.

7. On these facts the assessee contended before the Income Tax Officer that the assessee was only an investor and not a dealer in shares but this contention was rejected by the Income Tax Officer and the Appellate Assistant Commissioner.

8. Aggrieved by the said decision of the Appellate Assistant Commissioner, the assessee filed second appeal before the Tribunal. Before the Tribunal it was contended on behalf of the assessee (1) that the assessee never purchased equity shares of the said company from any outsider or any stranger except in a few cases from close friends or from members of the staff just to accommodate them; (2) that the shares that were acquired by the assessee were only right shares issued by the company to its existing shareholders; (3) that the assessee had to meet huge personal expenses and tax liability in the relevant accounting periods; (4) that the assessee had an overdraft account and he wanted to keep the said overdraft account within reasonable limit; (5) that the assessee wanted to nurse his investments in the company and (6) that the assessee had to and was forced and compelled by circumstances to sell some of the shares acquired by him. In the premises, the assessee's contention was that the sales of the said shares were neither effected voluntarily nor with a view to make any profit nor under a profit making scheme, but were effected under compelling circumstances and as no assessee could be a trader by compulsion, the assessee was not a trader in respect of these shares. The Tribunal rejected the said contentions. The Tribunal held : (1) The assessee was the Chairman of the Board of Directors of the said company. (2) The said company had ever since its inception expanding its business and making good profits. (3) Its capital had increased and, therefore, right shares were offered to the existing shareholders. (4) The assessee had a substantial holding of equity shares in the company. (5) It was not obligatory on the assessee to acquire right shares. (6) In fact, the assessee was indebted to the bank and was having an overdraft account on which he was paying interest. (7) Not only right shares were sold by the assessee, but he had also sold some of the original equity shares held by him.

9. The Tribunal was of the view that as the Chairman of the Board of Directors of the said company, the assessee knew the financial position of the company and also knew that the company's business was expanding and flourishing, and yet he sold away the shares of such a company held by him. The sale, according to the Tribunal, must have been to earn profits. The frequency of the acquisition of right shares and the sales in large numbers in quick succession, according to the Tribunal,

established the motive to make profit and that all the dealings in shares were part and parcel of a profit making scheme.

10. The Tribunal noted that the Appellate Assistant Commissioner had found that in some years, the income of the assessee was much more than the expenses he had to meet and notwithstanding that fact, the assessee had sold some shares. The Tribunal further noted that the correctness of this finding was neither challenged before the Tribunal nor anything established to the contrary. According to the Tribunal, therefore, if the assessee was under no obligation to acquire right shares, there was no necessity for him to apply for and obtain right shares except to make profits on their sales. According to the Tribunal, it is far from the conduct of a prudent and reasonable man like the assessee to expect him to sell away his capital assets to meet the recurring personal expenditure. The frequent acquisition of right shares at par coupled with the fact that even some of the original holdings were sold, were against the assessee's intention of nursing his investments according to the Tribunal.

11. The Tribunal noted that according to the Appellate Assistant Commissioner, such an activity was 'self-destructive purpose by self-cancelling activity'. The Tribunal was in agreement with the view of the Appellate Assistant Commissioner and came to the conclusion that it was the idea of huge profits that the assessee was making by sale of shares of the said company that compelled him to acquire right shares frequently and in large numbers notwithstanding the fact that he was indebted to the bank and he was having an overdraft account with it. The facts that the assessee did not sell all the right shares or that the founder of the company was interested in acquiring right shares or that he did not take all the right shares offered to him because of his financial liability, according to the Tribunal, would not affect the issue. The Tribunal, therefore, came to the conclusion that the assessee was doing business in shares in the assessment years under consideration.

12. Two members namely Judicial Member as well as the Accountant Member gave separate but concurrent opinions for coming to the conclusion that the assessee was a dealer in shares. In his separate order, the Accountant Member had observed that in the assessment years 1956-57 to 1960-61, both inclusive, the acquisition of the shares was large and so also the sale of shares and in the first three accounting years, the shares sold were much more than the shares acquired by right. The right shares acquired in those three years were 6111, 6102 and 1256 whereas the assessee had sold from time to time right shares which were 13,955, 7661 and 5050 respectively. The maximum number of shares held by the assessee was little over 56,600 and this number went down progressively from the assessment year 1953-54 to assessment year 1958-59 by about 15,000. The Accountant Member, therefore, was of the view that it was not possible to accept the submission of the assessee that the shares were sold only to reduce the overdraft taken from the bank.

13. It may be mentioned, while on this aspect, that during the first few years apart from the years in question i.e. 1959-60 and 1960-61, i.e. for the assessment years 1955-56, 1956-57, 1957-58 and 1958-59, the assessee had been treated by the revenue as an investor in shares and was not taxed on the dealings in these shares. This is an aspect which requires to be taken into consideration in conjunction with other factors in answering the question. The second point on this aspect is that for subsequent years for which Special Leave Nos. 8292-8293 of 1979 are pending are for the assessment years 1968-69 and 1969-70 and in those two years the Tribunal had accepted the position that the assessee was an investor and not a dealer in shares. This position, however, according to the revenue, had to be accepted in view of the judgment of the Bombay High Court in the instant case which is under appeal before this Court. Therefore, it was not, according to the counsel for the revenue, on any divergence of finding or any different inference being drawn from

the said findings but because of decision of the Bombay High Court and out of deference to it, the assessee had to be treated as an investor. The findings of the Tribunal for those two years are also the subject matter of Special Leave Petitions 8292 and 8293. These will have to be disposed of along with these appeals.

14. The High Court in the impugned judgment answered the question in favour of the assessee and held that the assessee was not a dealer in shares.

15. In this case the facts have been enumerated and tabulated in the statement of the case. The Tribunal on those facts came to the conclusion that the assessee was for the relevant two years a dealer in shares. The High Court, however, in answer to the question held to the contrary and held that the assessee was an investor in shares.

16. In the background of these facts, two questions arise, where courts have to deal with these types of transactions. The first question is, whether the finding of the Tribunal or the fact-finding body is based on evidence from which the conclusions arrived at by the said fact-finding body can be said to be either reasonable or possible. Therefore, in the context of the controversy in the instant case, it is necessary to examine what were the facts found by the Tribunal and whether all the facts have been fully considered by the Tribunal for the conclusions drawn. If the conclusions drawn by the Tribunal are pure inferences of facts, then no question of law arises and no occasion is caused for interference. If, however, the conclusion arrived at by the fact-finding body is such that no reasonable man could possibly have arrived at, then the conclusion arrived at by the Tribunal would be without evidence and perverse in law. If there is material to support the conclusion, the fact that another body or the court might have arrived at a different conclusion is not relevant.

17. The second question is what are the legal principles applicable to the facts of these types of cases to determine whether the conduct was that of a dealer in shares or an investor in the shares.

18. The two questions have been dealt together in many decisions which may be noted, though no case can provide guidance for all situations.

19. How in case of sale of shares the object or the purpose of selling the shares, in order to determine whether one was a dealer in shares or an investor in shares, should be viewed may be looked at from the angle of Lord Reid in J. P. Harrison (Watford) Ltd. v. Griffiths (H. M. Inspector of Taxes) (40 TC 281, 295-296) when he observed :

> The question has been asked in a number of cases - "If this was not trading, what was it ?" With all deference to those who have used that argument I do not think that it is very useful in most cases. Human affairs and business affairs are of infinite variety. They do not fit neatly into categories or classes. Innominate contracts and transactions are of frequent occurrence and I would not expect to find appropriate names to denote new kinds of operations devised for the sole purpose of gaining tax advantages. In the present case the question is not what the transaction of buying and selling the shares lacks to be trading, but whether the later stages of the whole operation show that the first step, the purchase of the shares, was not taken as or in the course of a trading transaction.

20. The real question as Lord Reid said was not whether the transaction of buying and selling the shares lacks the element of trading, but whether the later stages of the whole operation show that the

first step - the purchase of the shares - was not taken as or in the course of, a trading transaction. It was, further, reiterated in that decision that where a question of inference from certain facts found by the Tribunal arises, unless the court comes to the conclusion that the inference drawn by the Tribunal could not be reasonably drawn at all, then it is not proper to interfere with that finding of fact.

21. How a question of this nature should be viewed has been indicated by this Court as early as 1958 in G. Venkataswami Naidu & Co. v. CIT ((1959) 35 ITR 594 : (1959) Supp 1 SCR 646 : AIR 1959 SC 359). The question there was whether sale of a land to a company could be treated on the facts and circumstances of the case as an adventure in the nature of trade. There, on the facts, this Court upheld the findings of the Appellate Tribunal in affirming that the assessee knew that it would be able to sell the lands to the managed company whenever it thought it profitable to do so; that the assessee had purchased the four plots of land with the sole intention of selling them to the mills at a profit which intention raised a strong presumption in favour of the view taken by the Tribunal. This court reiterated that the jurisdiction conferred on the High Court under Section 66(1) of the Act of 1922 (hereinafter called the 'old Act') i.e. Section 256 of the Act of 1961, (hereinafter called the 'new Act') was limited to entertaining references involving questions of law. It was emphasised that if the point raised on reference related 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 might have due regard for the view taken by the Appellate Tribunal, its decision would not be fettered by the Tribunal's view. It was free to adopt such construction of the document or the statute as appeared to it reasonable. Where the point sought to be raised on a reference was a pure question of fact, the finding of fact recorded by the Tribunal must be regarded as conclusive in proceedings under reference. If, however, such a finding of fact was based on an inference drawn from primary evidentiary facts proved in the case, its correctness and validity were open to challenge in reference proceedings, within, however, narrow limits. The assessee or the revenue could contend that the inference had been drawn on considering inadmissible evidence or after excluding admissible and relevant evidence; and if the High Court was satisfied that the inference was 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 was not supported by any legal evidence; or that the impugned conclusion drawn from the relevant facts was not rationally possible; and if such a plea was established, the court might consider whether the conclusion was not perverse and should not, therefore, be set aside. It was to be remembered, however, that it was within those narrow limits that the conclusions of fact recorded by the Tribunal could be challenged in a reference to the High Court. Such conclusions could never be challenged on the ground that these were based on misappreciation of evidence. A conclusion reached by the Tribunal on the ground that it is a conclusion on a question of mixed law and fact, 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. In dealing with findings on questions of mixed law and fact the High Court however, has to accept the findings of the Tribunal on the primary questions of facts; but it is open to the High Court to examine whether the Tribunal had applied the relevant legal principles correctly or not; and in that sense, the scope of enquiry and the extent of the jurisdiction of the High Court in dealing with such points was the same as in dealing with pure points of law, and not beyond that.

22. Before considering other cases it may be appropriate to refer to the report of Royal Commission on Taxation of Profits and Income of England, which was presented to the Parliament of United

Kingdom in June 1955. There, the Royal Commission considered whether a simple test could be evolved that would separate taxable cases from non-taxable one. The Royal Commission noted that one was that profit arising from any realisation of property should be declared by law to be taxable income if the property had been acquired with a view to profit-seeking. This seems to have been the kind of test envisaged by the 1920 Commission where they spoke of "any profit made on a transaction recognisable as a business transaction, i.e., a transaction in which the subject matter was acquired with a view to profit-seeking". The difficulty, the Royal Commission felt, about applying that test was that, in any normal sense of the words, a "view of profit-seeking" might accompany many transactions that would not be called business transaction. Since few investors it was noted could expect that their investments would remain exactly stable in value in their hands, they are bound to contemplate the probabilities of rise or fall and it is hardly to be expected that they will not choose one for which they hope or expect a rise. The Royal Commission noted that Lord Buckmaster in Leeming v. Jones ((1930) 15 TC 333, 357) had observed that "an accretion to capital" did not become income merely because the original capital was invested in the hope and expectation that it would rise in value".

23. The Royal Commission at page 39 of the report observed that there should be no single fixed rule i.e. each case must be decided according to its own circumstances. The general line of enquiry that had been favoured by appeal commissioners and encouraged by the courts, according to the Royal Commission, was to see whether a transaction that is said to have given rise to a taxable profit bears any of the "badges of trade". The Royal Commission was of the view that that seemed to them the right line, and it had the advantage that it based itself on objective tests of what was a trading adventure instead of concerning itself directly with the unravelling of motive. At the same time, the Royal Commission was of the view that there was some lack of uniformity in the treatment of different cases according to the tribunals before which these had been brought. The Royal Commission sought to identify these "badges of trade" as follows :

> (1) The subject-matter of the realisation. While almost any form of property can be acquired to be dealt in, those forms of property such as commodities or manufactured articles, which are normally the subject of trading are only very exceptionally the subject of investment. Again property which does not yield to its owner an income or personal enjoyment merely by virtue of its ownership is more likely to have been acquired with the object of a deal than property that does.
>
> (2) The length of the period of ownership. Generally speaking, property meant to be dealt in is realised within a short time after acquisition. But there are many exceptions from this as a universal rule.
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> (3) The frequency or number of similar transactions by the same person. If realisation of the same sort of property occur in succession over a period of years or there are several such realisations at about the same date a presumption arises that there has been dealing in respect of each.
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> (4) Supplementary work on or in connection with the property realised. If the property is worked up in any way during the ownership so as to bring it into a more marketable condition; or if any special exemptions are made to find or attract purchasers, such as the opening of an office or large-scale advertising, there is some evidence of dealing. For when there is an organised effort to obtain profit there is a source of taxable income. But if nothing at all is done, the suggestion tends the other

way.

(5) The circumstances that were responsible for the realisation. There may be some explanation, such as a sudden emergency or opportunity calling for ready money, that negatives the idea that any plan of dealing prompted the original purchase.

(6) Motive. There are cases in which the purpose of the transaction of purchase and sale is clearly discernible. Motive is never irrelevant in any of these cases. What is desirable is that it should be realised clearly that it can be inferred from surrounding circumstances in the absence of direct evidence of the seller's intentions and even, if necessary, in the face of his own evidence.

24. In Oriental Investment Co. Ltd. v. CIT ((1957) 32 ITR 664 : 1958 SCR 49 : AIR 1957 SC 852) this Court had occasion to deal with the question of how far the finding in respect of dealing in shares was a question of fact or a question of law or a mixed question of fact and law. This Court observed that what were the characteristics of the business of dealing in shares or that of an investor was a mixed question of fact and law. What is the legal effect of the facts found by the Tribunal and whether as a result the assessee could be termed a dealer in shares or an investor was itself a question of law. The mere fact that a company had within its objects the dealing in investment in shares, did not give to the company the characteristics of a dealer in shares, but if other circumstances were proved it might be relevant for the purpose of determining the nature of the activities of the company. This Court observed that inference from facts would be a question of fact or a question of law according as the point for determination is one of pure fact or a mixed question of law and fact. A finding of fact without evidence to support it or based on relevant and irrelevant matters is not unassailable. This Court observed at p. 669 of the Reports that it was difficult to draw a line and draw a distinction as to what was a question of law and what was a question of fact. After referring to several authorities, this Court came to the conclusion that though English decisions began with a broad definition of what were questions of law, ultimately the House of Lords decided that a "matter of degree" was a question of fact and it had also been decided that a finding by the Commissioners of a fact under a misapprehension of law or want of evidence to support a finding were both questions of law. This Court observed as to what are the characteristics of the business of dealing in shares or that of an investor was a mixed question of fact and law. What is the legal effect of the facts found by the Tribunal and whether as a result the assessee could be termed a dealer in shares or an investor was a question of law. As was observed by Venkatarama Ayyar, J. in Sree Meenakshi Mills Ltd. v. CIT ((1957) 31 ITR 28 : 1956 SCR 691 : AIR 1957 SC 49), that in between the domains occupied respectively by question of fact and law, there is a large area, in which both these questions run into each other, forming, so to say conclaves within each other. These are mixed questions of law and fact. The instant case is one.

25. In the case of Stanley (Surveyor of Taxes) v. Gramophone and Typewritter Ltd. (5 TC 358), the Court of Appeal in England had dealt with that question. The Court of Appeal in England observed at p. 374 of the report as follows :

> It is undoubtedly true that, if the Commissioners find a fact, it is not open to this Court to question that finding unless there is no evidence to support it. If, however, the Commissioners state the evidence which was before them and add that upon such evidence they hold that certain results follow, I think it is open, and was intended by the Commissioners that it should be open, to the court to say whether the evidence justified what the Commissioners held.

26. In Californian Copper Syndicate (Limited and Reduced) v. Harris (Surveyor of Taxes) (5 TC 159, 166), Lord Justice Clerk observed that the test was whether the sum of gain that has been made was a mere enhancement of value by realising a security, or was it a gain made in an operation of business in carrying out a scheme for profit-making.

27. In IRC v. Lysaght ((1928) AC 234, 247 : 13 TC 511), Lord Buckmaster observed that the distinction between questions of fact and questions of law is difficult to define, but if the circumstances found by the Commissioners in the special case were incapable of reaching the conclusion reached by them, then the conclusion could not be protected by saying that it was a conclusion of fact since there were no materials upon which that conclusion could depend. But if the incidents relating to certain factors which lead to the conclusion were varying that certainly produce the result then the matter must be a matter of degree, and the determination of whether or not the degree extended so far as to make a man in that case resident or ordinarily resident in England was for the Commissioners and it was not for the courts to say whether they would have reached the same conclusion.

28. The question was again considered in Edwards (Inspector of Taxes) v. Bairstow (3 WLR 410 : (1955) 28 ITR 579 (HL)). There the House of Lords held that the facts found led inevitably to the conclusion that the transaction was an adventure in the nature of trade and that the Commissioners' inference to the contrary should be set aside. Viscount Simonds observed that whether the transaction was not an adventure in the nature of trade was an inference of fact but could be set aside because it appeared that the Commissioners had acted without any evidence or on a view of the facts which could not reasonably be entertained. In making that inference the Commissioners were to be assumed to have been rightly directed in law as to the characteristics which distinguish such an adventure and, so far as the Scottish courts had diverged from this approach to such problems, the other approach adopted by the English courts was to be preferred. Lord Radcliffe observed that without any misconception of law appearing on the face of the case stated, the facts found may be such that no person acting judicially and properly as to the relevant law could have come to the determination reached.

29. We have noted Lord Reid in J. P. Harrison (Watford), Ltd. v. Griffiths (H. M. Inspector of Taxes) (40 TC 281, 295-296) saying that intention at the time of the purchase was a relevant and often a conclusive factor whether the resale was in the nature of an adventure in trade or not. But in Saroj Kumar Mazumdar v. CIT ((1959) 37 ITR 242 : 1959 Supp 2 SCR 846 : AIR 1959 SC 1252), this Court referred to the observations of Lord Dunedin in the case of Jones Leeming v. Jones ((1930) 15 TC 333, 357) where the House of Lords observed that the fact that a man did not intend to hold an investment might be an item of evidence tending to show whether he was carrying on a trade or concern in the nature of trade in respect of his investments, but per se it led to no conclusion whatever.

30. In the case of Ramnarain Sons (Pr.) Ltd. v. CIT ((1961) 41 ITR 534 : (1961) 2 SCR 904 : AIR 1961 SC 1141), this Court observed that in considering whether a transaction was or was not an adventure in the nature of trade, the problem must be approached in the light of the intention of the assessee having regard to the legal requirements which were associated with the concept of trade or business. The inference on this question raised by the Tribunal on the facts found was of mixed law and fact and was open to challenge before the High Court on a reference. The question whether the assessee's transactions amounted to dealing in shares and properties or to investment, was a mixed question of law and fact, and the legal effect of the facts found by the Tribunal on which the assessee could be treated as a dealer or an investor, was a question of law.

31. In the case of Janki Ram Bahadur Ram v. CIT ((1965) 57 ITR 21 : (1965) 3 SCR 604 : AIR 1965 SC 1898), this Court observed that the profit motive in entering a transaction was not decisive, for an accretion to capital did not become taxable income merely because an asset was acquired in the expectation that it might be sold at a profit. This Court further observed that if a transaction was related to the business which was normally carried on by the assessee, though not directly part of it, an intention to launch upon an adventure in the nature of trade might readily be inferred.

32. This Court had occasion to consider the question of new shares offered to the holder of old shares in a company with right to renounce in the case of Dhun Dadabhoy Kapadia v. CIT ((1967) 63 ITR 651 : (1967) 2 SCR 1 : AIR 1967 SC 614). There, the appellant, who was not a dealer in shares, held by way of investment 710 ordinary shares in Tata Iron and Steel Co. Ltd. The company made an offer to her by which she was entitled to apply for 710 new ordinary shares at a premium with an option of either taking the shares or renouncing them, wholly or partly, in favour of others. The appellant renounced her right to all the 710 shares on June 12, 1956, and realised Rs 45,262.50. When this amount was sought to be wholly taxed as a capital gain, the appellant claimed that on the issue of the new shares, the value of her old shares depreciated, since the market quotation of the old shares which was Rs 253 per share on June 1, 1956 fell to Rs 198.75 on June 4, 1956 and that as a result of this depreciation she suffered a capital loss in the old shares to the extent of Rs 37,630 which she was entitled to set off against the capital gains of Rs 45,262.50. In the alternative she claimed that the right to receive the new shares was a right which was embedded in her old shares and, consequently when she realised the sum of Rs 45,262.50 by selling her right, the capital gain should be computed after deducting from that amount the value of the embedded right which became liquidated. It was held that the appellant was entitled to deduct from the sum of Rs 45,262.50 the loss suffered by way of depreciation in the old shares.

33. The question was again considered by this Court in Dalhousie Investment Trust Co. Ltd. v. CIT ((1968) 68 ITR 486 : (1968) 2 SCR 353 : AIR 1968 SC 761). There this Court on the facts came to the conclusion that the assessee dealt with the shares of Mcleod and Co. and the allied companies as stock-in-trade, and that these were in fact purchased even initially not as investment but for the purpose of sale at a profit and therefore the transactions amounted to an adventure in the nature of trade, and the profit derived by the appellant from the sale of shares was therefore revenue receipt and as such liable to income tax. It was held that the decision of the department in the earlier years that the transactions were in the nature of change of investment was not binding in the proceedings for assessment during the subsequent years.

34. In P. M. Mohammed Meerakhan v. CIT ((1969) 73 ITR 735 : (1969) 2 SCC 25 : (1969) 3 SCR 659 : AIR 1969 SC 1053), this Court reiterated that it was not possible to evolve any single legal test or formula which could be applied in determining whether a transaction was an adventure in the nature of trade or not. The answer to the question must necessarily depend in each case on the total impression and effect of all the relevant factors and circumstances proved therein and which determine the character of the transaction.

35. In Raja Bahadur Kamakhya Narain Singh v. CIT ((1970) 77 ITR 253 : (1969) 3 SCC 791 : (1970) 2 SCR 163 : AIR 1971 SC 794), the question of adventure in the nature of trade was again considered by this Court and it was reiterated that since the expression "adventure in the nature of trade" implied the existence of certain element in the transactions which in law would invest these with the character of trade or business and the question on that account became a mixed question of law and fact, the court could review the Tribunal's findings if it had misdirected itself in law. It was fairly clear that where a person in selling his investment realised an enhanced price, the excess over

his purchase price was not profit assessable to tax as income, but it would be so, if what was done was not a mere realisation of the investment but an act done for making profit. The distinction between the two types of transactions is not always easy to make. Whether the transaction is of one kind or the other depends on the question whether the excess is an enhancement of the value by realising a security or a gain in an operation of profit-making. The assessee might invest his capital in shares with the intention to resell these if in future their sale bring in a higher price. Such an investment, though motivated by a possibility of enhanced value, did not necessarily render the investment a transaction in the nature of trade.

36. In the premises, the totality of all the facts will have to be borne in mind and the correct legal principles applied to these. If all the relevant factors have been taken into consideration and there has been no misapplication of the principles of law then the conclusion arrived at by the Tribunal cannot be interfered with because the inference is a question of law. If such an inference was a possible one, subject, however, that all the relevant factors have been duly weighed and considered by the Tribunal, the inference reached by the Tribunal should not be interfered with.

37. In order to determine the question involved in the instant appeals, certain features will have to be borne in mind. All the right shares were acquired directly as right shares at par from the company. It was further urged that as Chairman assessee was duty bound to support the issue of new shares by the company. Sales were made to reduce his overdraft, according to the assessee. The sales were also made to purchase a house in Denmark and for which permission had been obtained from Reserve Bank of India to remit Rs 1 lakh. This would appear from the assessment order for 1959-60.

38. It was further emphasised that the market price was lower on the date of sale and there was no profit motive. The Income Tax Officer, however, held that profit was the intention of the assessee for the acquisition of the shares. The shares acquired after April 1, 1954 were held as trading stock. This date was chosen by the Income Tax Officer because from this date, the assessee started selling as well as buying shares on a large scale. Therefore, according to the revenue, this indicated dealings in shares. It may be noted that as such there was basis for choosing that.

39. The Tribunal, however, after consideration of all these facts came to the conclusion that the assessee was a dealer in shares.

40. The judgment of the High Court under appeal which incidentally is reported in H. Holck Larsen v. CIT ((1972) 85 ITR 285 (Bom)), held that the decision in the earlier years that the assessee was an investor was not binding for subsequent years, that the assessee was always an investor. The High Court further observed that the frequency of transactions was not decisive. According to the High Court, it was necessary to appreciate the implications of the issuance of right shares and purchase thereof by the assessee. Right shares were issued by virtue of the provisions of Section 81 of the Companies Act. It is not necessary to set out the provisions dealing with the issue of right shares. The issuance of the right shares depreciates the value of the original shares initially.

41. In the impugned judgment, it was held that whether the transactions of sale and purchase of shares were trading transactions or in the nature of investment was a question of law and must be viewed in the light of the intention of the assessee.

42. On the question of how the right shares affect the original shares, our attention was drawn to Investments - An Introduction to Analysis and Management, 5th edn., wherein it was emphasised at

p. 35 of the book that the world economies offered a wide variety of securities or assets to satisfy the investor's desire for return and risk. Most investors are risk-averse, and attempt to maximize their wealth. As a principle, investors maximize wealth by maximizing return and minimizing risk. Investment may be defined as the purchase by an individual or institution, it was observed of an asset that produces a return proportional to risk over some future period. The investments, it was further observed, available for purchase were typically financial assets, but real or tangible assets might be included among the alternative investments.

43. Another principle guiding investment, it was emphasised at p. 604 of the book, was the main reason for diversification - reduction of the risk of loss of capital or income. Investors face an unknown and uncertain future and try to diversify the investments. As a general rule it was emphasised at p. 603 of the book, growth of capital was a desirable objective of portfolio management. This did not mean that every investor must invest in growth stocks; this would be inconsistent with many investors' needs. A fund can be built up from reinvested income as well as through the purchase of growth shares. A large fund does provide more income for the investor than a small fund. Many investors have increased the capital value of their funds through reinvested dividends and interest income. Some wanted income, some capital gains, and some a combination of both. In spite of these variations, several objectives should be considered as basis to a well executed investment programme. The guiding principles establish the indifference curve of risk versus return for the investor.

44. To various other authorities our attention was drawn to highlight this aspect.

45. In Business Finance - F. W. Paish and R. J. Briston, 6th edn. at p. 115, it was observed how issue of right shares depreciates the value of the original shares. It was thus observed :

> Since the price to be paid for the new shares is substantially below the current market price of the existing ones, the price per share of the enlarged issue will normally be below the price of the old shares before the issue, and the price of the old shares will therefore tend to fall; but shareholders will recover this loss either by taking up the new shares themselves or by selling their rights. If they neglect to do either they will suffer a loss of value on their existing shares without compensation, unless the company, as is now normally the case, sells their rights on their behalf and pays over the proceeds to them. Whatever happens, either the shareholders will take up the shares themselves or they or the company will sell their rights to someone else who will do so. The success of the issue can therefore be assured, provided that it is not too large in relation to the capital already issued.

46. As noted above, Section 81 of the Companies Act, 1956 so far as relevant for the present purpose provides that if a company proposes to increase its subscribed capital by allotment of further shares, such shares should be offered to the existing shareholders of equity shares and the offer should be deemed to include a right to renounce the shares. The right to receive the new shares is embedded in the old shares. Therefore the moment, it was emphasised by the High Court, the issue of right shares are announced, the original share was bound to depreciate because a larger number of people participate in the existing capital.

47. The High Court emphasised that in this case the assessee had acquired the right shares and sold them and he also renounced some of those rights. The question which the High Court was confronted with was whether by indulging in those transactions, the assessee was trading in shares

or whether he entered into those transactions in the old capacity of all investor. The High Court was of the view that the course of dealings in the instant case showed that the dominant motive of the assessee in acquiring and selling the new shares and in renouncing some of the right shares was to prevent the inevitable erosion of his capital. If the assessee, according to the High Court, had not acted in the manner he did, his original investments would have depreciated in value, and therefore, in a sense he entered into these transactions to nurse his investments. It was important to bear in mind, and that could be appreciated if one had regard to what has been noted before that the right shares, according to the High Court, were not acquired by the assessee as a matter of free choice. The assessee acquired, according to the High Court, those shares because if the assessee did not do so, his capital would erode. But as is apparent from the facts noted before, he had to find so much more money in order to acquire the shares and it was not always prudent to permit the overdraft account to swell. Having regard to all the facts as noted by the High Court and referring to the relevant decision, the High Court was of the view that true object in this case was to prevent depreciation in the value of his investment. The assessee also in this case, as we have noted before, renounced some of his rights to get the right shares.

48. The High Court was of the view that the true intention of nursing the investment has not been appreciated by the Tribunal. Therefore, in the light of the facts, the Tribunal's inference was not a justified one in the facts and circumstances of this case.

49. At the outset it must be stated that the Tribunal in its order has noted that according to the assessee, the contention of the assessee was that with a view to keep the bankdraft (sic overdraft) within reasonable limits and with the prime object of nursing his investments in the company, the assessee had to and was forced and compelled by circumstances to sell some of the shares and the Tribunal has also noted that the assessee would not be a trader by compulsion. The Tribunal had considered these arguments. The Tribunal also noted that the assessee was the Chairman of the Board of Directors. The Tribunal also noted that ever since its inception, the company was expanding its business and making good profits. Its capital had increased and, therefore, right shares were offered to the existing shareholders. The assessee had a substantial holding of equity shares in the company. It was therefore, according to the Tribunal, not obligatory on the assessee to acquire right shares. The Tribunal considered the acquisition of right shares in the background of the indebtedness of the assessee to the bank and he was having an overdraft account on which he was paying interest. The Tribunal noted the frequency of the acquisition of the right shares and the sales in large numbers in quick succession, and according to the Tribunal, the motive was to make profit and that all the dealings in shares were part and parcel of a profit-making scheme. The Tribunal further noted that the Appellate Assistant Commissioner, in fact, had found that in some years the income of the assessee was much more than the expenses he had to meet and notwithstanding that fact, the assessee had sold some shares. According to the Tribunal, the correctness of this finding had neither been challenged before the Tribunal nor anything established to the contrary. The Tribunal was of the view that the assessee was under no obligation to acquire right shares. There was no necessity for him to apply for right shares except to make profits. It was far from the conduct of a prudent and reasonable man like the assessee to expect him to sell away his capital assets to meet the recurring personal expenditure, according to the Tribunal. The frequent acquisition of right shares at par coupled with the fact that even some of the original holdings were sold, was against the submission that the sale was to nurse the investment.

50. According to the Tribunal if the fact of the overdraft by the assessee was borne in mind and if the fact of overdraft is kept in view then it could not be said that the assessee had purchased the right shares with a view to what can be ascribed as nursing the investments.

51. Therefore bearing the principles of the different cases which we have set out hereinbefore and considering the motive in the light of the transactions and the intention with which the shares were acquired, nature of the shares, the question has to be judged whether there has been trading in shares or in the words of Lord President Clyde, whether there was plunge in the waters of trade, in buying shares or acquisition of shares (see Balgownie Land Trust Ltd. v. Commissioner of Inland Revenue (14 TC 684, 691)).

52. The High Court, in our opinion, made a mistake in observing whether transactions of sale and purchase of shares were trading transactions or whether these were in the nature of investment was a question of law. This is a mixed question of law and fact. The entirety of the said facts have been dealt with both by the Tribunal as well as the High Court. The High Court observed that there was nothing on record to show as to what extent and what measure, the overdraft account was utilised for acquiring right shares nor indeed there was anything to show the gain which was likely to result which in fact resulted to the assessee by paying interest on the borrowed fund. But the relevant facts must be considered in its proper perspective. It appears that the facts, that the assessee was the Chairman of the company - effect of the issue of right shares vis-a-vis original shares had not been fully kept in proper perspective by the Tribunal in its evaluation. It further appears that the fact that the assessee was the Chairman of the company and in fact that if he did not participate in buying right shares, that would have adverse effect on the value of the shares of the company, was also not kept in view by the Tribunal. Consideration of all relevant facts involves appreciation of all the facts in their proper perspective. If that is not done it cannot be said that there has been consideration of all relevant factors. Tribunal, it appears, fell into error in not taking into consideration properly and fully - though it noted, the fact that if the right shares were not subscribed by the assessee, his original shares would depreciate in value, but the assessee was also in need of money - he had an overdraft with bank and he had to remit money to Denmark for the purchase of a house - and further when right shares were issued had he not subscribed to these, there might have been adverse effect on the market so far as the share of the company were concerned. In the background of the correlation of these factors the action of the assessee was like a prudent investor and not of a plunger in the waters of trade. The dealings in the right shares by the assessee keeping in the background these were right shares and effect of non-subscription the value of the original shares were not fully appreciated by the Tribunal. And as such the attitude of a person entitled to right shares for judging whether he was a dealer and investor was not viewed in proper dimension but merely noted by the Tribunal resulting in the non-consideration of a vital factor leading to an erroneous inference. The Tribunal in this case has undoubtedly noted the assessee's contention of nursing the investment. The Tribunal, however, has not considered in its order the actual position as to how the nursing of the investment was necessary. The Tribunal thus erred. In that view of the matter the High Court was justified in interfering with the conclusion reached by the Tribunal. There is no reason to interfere with the order of the High Court.

53. In the premises these appeals must fail and are dismissed with costs.

54. In the view we have taken the Special Leave Petitions 8292-8293 of 1979 are accordingly dismissed. In the facts and circumstances, however, of these cases, there will be no order as to costs of these applications.

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