

PETITIONER:
RAJA BAHADUR KAMAKHYA NARAIN SINGH

Vs.

RESPONDENT:
COMMISSIONER OF INCOME-TAX BIHAR AND ORISSA

DATE OF JUDGMENT:
01/09/1969

BENCH:
SHELAT, J.M.
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SHELAT, J.M.
VAIDYIALINGAM, C.A.

CITATION:
1971 AIR 794 1970 SCR (2) 163
1969 SCC (3) 791
CITATOR INFO :
RF 1986 SC1695 (35)

ACT:
Capital or Income-Purchase and sale of gold and shares-
Principles for deciding whether profit on transactions is
revenue or capital receipt-Question is of mixed fact and
law-High Court in reference not barred from going into
findings of Tribunal on such question on the ground that it
is one of fact and therefore final.

HEADNOTE:
The assessee inherited a vast estate consisting of
agricultural and other land as also Government securities
worth Rs. 40 lacs. In 1937 he attained majority and control
of the estate from the Court of Wards. In the accounting
year 1938-39 he sold some of these securities at a profit.
Thereafter he opened an account in the Imperial Bank of
India in the name of his wife and called it "account of 48
lacs floating in the share market." In September 1939 he
purchased shares worth Rs. 34.14 lacs out of the said fund
but sold them, again at a profit in the Years 1939', 1940'
and 1941. The profits on the said sales of shares were
subjected to tax by the Income-tax Officer in the years
1939-40, 1940-41 and 1941-42. The Tribunal however held
that the assessee was not a dealer in shares and held the
profits not to be taxable. Between June. and November 1940
the assessee purchased gold for Rs. 28.47,380/--from out of
the sale proceeds of the aforesaid shares. This gold was
sold 'at a profit in the accounting periods relevant to the
1945-46 and 1946-47 assessment years. With the sale
proceeds certain shares including 7,025 shares of Karanpura
Development Co. Ltd. were purchased, most of which were sold
at a profit. Certain Victory Bonds were purchased and
resold within two months. The Income-tax Officer subjected
the profits from the sales of gold and Karanpur shares to
tax in the assessment years 1945-46 and 1946-47. The
Tribunal on ,considering the whole pattern of transactions
from 1938 onwards came to the conclusion that the said'
profits were rightly taxed. The High Court upheld the view
of the Tribunal holding inter alia, that the findings were
of fact and not arrived at without evidence so that no

interference was warranted in reference proceedings. The assessee appealed.

HELD: (1) When a transaction is not in the ordinary lines of an assessee's business the facts must be properly assessed to discover whether it was in the nature of trade. The test often applied' is--has the assessee made his shares and securities the stock-in-trade of a business? [171 G; 172 H]

(ii) Since in the present case the Tribunal had the advantage of examining the assessee's transactions during the whole period i.e. right from 1938-39 to 1944-45 and thus had more comprehensive picture of all the transactions, there would be no bar to its coming to a conclusion different from that arrived at in the earlier years. if the acts and conduct of the assessee taken as a whole throughout the period pointed to a different conclusion. [174 A--B]

(iii) On the facts and circumstances of the case, however the finding of the Tribunal, concurred in by the High Court, that the transactions in question were in the nature of trading transactions, was not justified. [174 C--D]

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(a) It is a notorious fact that in 1940 the fortunes of the allies were none too bright. The conversion by the assessee of his entire share holding into gold in that year was consistent with his case that he did so because of the nervousness engendered by the breaking out of the war, the initial German victories, and the fall of France.. The fact that the assessee did not invest all his cash would not mean, 'as the Tribunal thought, that his case about the purchases of gold was not correct. [174 D--F]

The Tribunal also failed to give due significance. to the fact that the assessee who started with the plan of getting 'at least net 7% yield, put a very large part of his funds into gold, an altogether sterile security, and retained it for 4 years. The price of gold began to rise in 1941 and was at its peak in 1943. The fact that the assessee did not sell his gold then but only in October 1944 when the price had fallen showed that it was only after the: fortunes of war had turned in favour of the allies and confidence restored that he felt it safe to invest his money in income-beating securities. The further fact that he sold practically the whole of his stock of gold in October 1944 instead of reselling it bit by bit after the price was rising since 1942 was inconsistent with the hypothesis that the object with which the gold was purchased was to trade in it. [174 G--H; 175 A--D]

(b) The fact that the account in the Imperial Bank opened in 1939 was called "Rs. 48 lacs floating in the share market" was given undue significance by the Tribunal. Properly viewed it only meant that the assessee wanted to set apart this fund for transactions in shares and securities and not mix up his other capital and the income arising from his estate. [175 D--E]

(c) The sale of the. Victory Bonds within two months of their purchase would not invest the transaction with the stamp of trade or business they were only purchased to show to the authorities that his estate had made a contribution to the war effort. [175]

(d) The Karanpur shares were purchased by the assessee with a view to getting control over the company's management by procuring 51% of its total shares. When that plan failed he sold these shares. In these circumstances the transaction could not be considered to be on revenue account. [175 G--H; 176 D]

Kishan Prasad & Co. Ltd. v.C.I.T., (1955) 27 I.T.R. 49 and C.I.T.v. National Finance Ltd. (1962) 44 I.T.R. 788, 'applied.

(e) The expression 'adventure in the nature of trade' implies the existence of certain elements in the transactions which in law would invest them with the character of trade or business. The question therefore whether a particular transaction is an adventure. in the nature of trade is a mixed question of law and fact and the court can review the Tribunal's finding thereon. Therefore in the present case the High Court was wrong in treating the Tribunal's decision as a finding of fact and refusing to interfere on that ground. [171 A--C]

Venkataswami Naidu & Co. v.C.I.T., (1959) 35 I.T.R. 594, 603, 604 and Liquidators of Pursa Ltd. v.C.I.T., (1954) 25 I.T.R. 265, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 481 and 482 of 1966.

Appeals by special leave from the judgment and order, dated April 15, 1963 of the Patna High Court in Misc. Judicial Cases Nos. 342 and 346 of 1954. 165

S.T. Desai and D.N. Mukherjee, for the appellant (in both the appeals).

Jagadish Swarup, Solicitor-General, S.K. Aiyar, R.N. Sachthey and B.D. Sharma, for the respondent (in both the appeals).

The Judgment of the Court was delivered by

Shelat, J. These two appeals, under special leave, arise from two References to the High Court of Patna under s. 66(2) of the Income Tax Act, 1922 and relate to the assessment years 1.945-46 and 1947. In the first appeal, the question arising for determination is whether, on the facts and circumstances of the case, the surplus receipt of Rs. 13,43,469/-, realised as a result of the sale of gold, is assessable as income, or profits or gains for the assessment year 1945-46 under s. 4(3) (vii) of the Act. In the 2nd appeal, two questions arise for determination; one relates to the surplus receipt of Rs. 33,481/- arising out of the sale of some more gold, and the second relates to the receipt of Rs. 88,522/- realised by the assessee as a receipt as a result of sale of certain shares. All the three questions raise the common problem whether the said transactions in gold and shares were by way of realisation of investment or were adventures in the nature of trade or business.

The assessee was at all material times a landholder deriving large income from agriculture, royalties of minerals and income from forests forming part of his estate. Prior to 1937, when he was a minor, his estate was under the management of a Court of Wards. On attaining majority, the estate, which included Government securities of the value of about Rs. 40 lacs, was handed over to him on August 19, 1937. During the account year 1938-39 he sold the whole lot of these securities and realised Rs. 44,25,088/-, the sale thus resulting in an excess of Rs. 4,55,305/-. This excess amount was assessed as profit by the income-tax officer for the assessment year 1939-40. But on appeal against the assessment order, the Appellate Tribunal set aside that order on a finding that the said sale was by way of a change in investment, and therefore, was not a

transaction in the nature of trade or business. On March 23, 1939, the assessee opened an account in the Imperial Bank of India initially with Rs. 46 lacs, which included the said sale proceeds of Rs. 44 lacs 'and odd and to which on March 27, 1939 he added Rs. 2.60 lacs. The account was opened in the name of his wife and was called "Account of Rs. 48 lacs floating in the share market"' In September 1939, the assessee purchased shares and debentures of the value of Rs. 34.14 lacs from out of the funds in the said account. He, however, sold certain shares for Rs. 5,75,723/- in October 1939, and then the rest of them in 1940 and 1941 realising Rs. 29,58,677/- and 166

Rs. 64,201/- respectively. The first sale fetched a profit of Rs. 1,17,064/- the second a profit of Rs. 25,133 and the third a loss of Rs. 1,642/-. The income-tax officer brought to tax the two surpluses in the assessments for the assessment years 1940-41 and 1941-42. But the department was again unsuccessful as the Tribunal once again held, on the strength of the correspondence which had passed between the assessee, his bankers axed his brokers in Calcutta, that the only possible conclusion emerging from that correspondence was that the assessee's intention was not to deal in shares and debentures, and that the said transactions were a mere change in investment carried out of a single scheme of earning a better yield from investments. The Tribunal's orders in respect of these assessments for the assessment years 1939-40 to 1941-42 were made part of the Statement of Case filed by the Tribunal before the High Court in the present References.

Between June 28, 1940 and November 9, 1940 the assessee purchased 68,109 tolas of gold for Rs. 28,47,380/- from out of the sale proceeds of the said shares. The gold so purchased was kept in his family vaults at Padma, the seat of his estate, for nearly 4 years. Between October 9, 1944 and October 20, 1944, he disposed of the bulk of the gold, i.e. 55,494 tolas, for Rs. 36,80,174/-, the sale resulting in a surplus of Rs. 13,43,469/-, which is the subject-matter of the first appeal. The remaining quantity of gold was sold of October 19, 1945, and that sale brought him an excess of Rs. 33,481/-, which is part of the subject-matter of the second appeal.

In respect of these two surplus amounts, the assessee contended that they were the result of a change in investment and could not be said to be transactions in the nature of trade or business. His case was that neither the Government securities, nor the shares and debentures purchased out of their sale proceeds, nor the gold were sold and purchased by way of dealing in them, that at no time they became his stock-in-trade for any business or adventures in the nature of trade or business therein, that the transactions were mere conversions from one investment to another, depending upon the circumstances which prevailed during the respective periods and that the sale of gold in 1944 and 1945 was occasioned partly due to the tide in the second world war turning in favour of the ,allies and partly due (a) to his having to pay Rs. 7 lacs by way of income-tax, (b) expenses for the marriage of his younger brother, (c) for payment of Rs. 6 lacs debt to one Gupta and (d) for purchase of Victory Bonds worth Rs. 14 lacs and odd 'at the instance of the Government authorities as contribution of his estate to the war effort.

The Tribunal rejected the case that gold had been sold for the reasons given by the assessee or as a change in investment and

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held that: (1) conversion of shares into gold was not due to any panic resulting from the war, (2) that there was no pressing necessity for the sale of gold as alleged by him, (3) that Victory Bonds were not by way of any war effort since the assessee sold them away within a short time after their purchase, and (4) that the sale proceeds of gold were utilised in purchasing shares for which he borrowed an additional amount of Rs. 5.10 lacs in 1945-46 against gold. In this view the Tribunal confirmed the I.T.O.'s decision that the two excess amounts were liable to income tax in the two assessment years.

The sale proceeds of gold sold as aforesaid were utilised by the assessee in purchasing 7325 shares of Karanpura Development Co. Ltd. for Rs. 2,37,267/- during the period from December 8, 1944 to April 20, 1945 and shares of Bokaro Ramgur Co. for Rs. 39,81,663/- purchased in 1945-46. Part of the sale proceeds were 'also' utilised in purchasing the said Victory Bonds. Between November 8, 1945 and February 21, 1946, he sold 6950 of the Karanpura shares realising a net surplus of Rs. 88,522/-, which the Income Tax Officer treated as business profit and brought to tax for the assessment year 1946-47.

As the Statement of Case by the Tribunal shows, the Tribunal examined the assessee's dealings since the time he took over the said estate. The Tribunal noted that the said shares were purchased from the said Rs. 48 lacs in the Bank reserved, for that purpose and that they were sold and purchased at very short intervals. From these facts it held that he must be considered to have launched a scheme in dealing in shares, which conclusion, it thought, was strengthened by the fact of the assessee having borrowed Rs. 5.10 lacs for the said purpose. The Tribunal further held that the complete picture of the said transactions over a length of time had not 'been before the preceding Tribunal when it passed the earlier orders for the assessment years 1939-40 to 1941-42, and therefore, its conclusions were not applicable to the transactions in question. It consequently held the assessee to be a dealer in shares. As regards the gold, also, the Tribunal confirmed the orders of the I.T.O. rejecting the assessee's case that the gold was purchased by him owing to the war crisis and sold by him on account of the pressing necessities alleged by him and the change in the war situation then.

By an order dated April 2, 1959, the High Court referred that statement of Case back to the Tribunal under s. 66(4) directing it to consider further all the materials before it and file a supplementary Statement of Case as the High Court found the Statement factually incorrect in certain respects. The Tribunal accordingly sent a supplementary Statement of Case on April 23, 1960.

After setting out the assessee's transactions of the sale of Government securities in 1938-39, the purchase of shares from

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their sale proceeds, their sale in 1939-40 and 1940-41, the purchase of gold and its sale, the Tribunal once again rejected the assessee's claim that those transactions were conversions of one investment to another made for a better return or that the gold was sold in October 1944 for pressing necessities alleged by the assessee. Regarding the purchase and sale of shares, the Tribunal stated that the assessee purchased shares of the value of Rs. 37 lacs and odd in 1945-46, that those were shares of two, concerns only, Bokaro, and Ramgur Co. Ltd. and Karanpura Development Co.

Ltd. and that as the latter company's shares were of the value of Rs. 2,37,267/- only, the 'bulk of the amount of Rs. 37 lacs and odd went into the purchase of the shares of Bokaro: and Ramgur Co.. Ltd. The Tribunal noted that the sale of Karanpura shares resulted in a net profit of Rs. 88,522/-, that in respect of the Karanpura shares there was correspondence showing that his brokers had advised him to acquire 51% of the company's share holding as he desired to obtain control over its management, that for doing so he wanted to obtain founders' shares (each of which shares carried 3 votes per share), that a compromise was proposed in a suit he had filed as the lessor of the mines leased out to the company, that M/s. Bird & Co., the managing agents of that company, were not willing to sell him shares representing the unissued capital of the company on terms proposed by the assessee and that ultimately he failed to obtain majority of shares which only could have enabled him to obtain control over the company's management. But the Tribunal found that "the assessee was attempting to obtain control of the company not by purchasing of shares in the market, but by issue of shares by the company in order to settle the dispute between the company and the assesses. These negotiations finally failed." It finally held that having perused the correspondence and having regard to the circumstances, the purchase of Karanpura shares was not in pursuance of a scheme to obtain control over the company by acquiring 51% of the votes therein.

The High Court, after hearing the: References, held that though the Tribunal had in the earlier assessments held that the assessee's transactions in shares, securities and gold did not amount to transactions in the nature of trade or business, and therefore, the assessee could not be treated as a dealer- in those articles. There was no bar to the revenue coming to a different conclusion, though to do so it must have some new materials and facts before it. It further held that the present Tribunal could a/so arrive at such a conclusion having regard to: (a) the frequency of transactions of purchase and sale of shares, (b) the short interval between purchase and sale of shares, (c) the fact of Rs. 48 lacs in the assessee's wife's account having been ear-marked for shares transactions, (d) his borrowing Rs. 5.10 lacs 'against gold for purchase

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of shares, and lastly, the fact that the Tribunal this time had before it a more complete picture of the assessee's transactions over a length of period which its predecessor had not when it dealt with the assessments for the assessment years 1939-40 to 1941-42. The High Court further held that there was fresh material, namely, that when the gold was sold, its sale proceeds were again invested in shares and the fact that though Victory Bonds were purchased in January 1945 they were sold after an interval of two months only. The High Court, in this view, concluded that "the Appellate. Tribunal, therefore had before it fresh materials for coming to a conclusion contrary to the one come by its predecessors in the previous orders." It rejected the assessee's case: (a) that he had converted one investment into another, i.e. from shares and securities to gold, because of the worsening of the war situation after the fall of France in 1940, (b) that when the war situation improved in 1944 and with that the price of gold began to fall he once again converted his investment from gold to shares, i.e., from an unproductive investment into one which could give him an adequate yield, and (c) that he had sold gold because of pressing

necessities. The first contention was held unsustainable because even after purchasing gold the assessee had retained considerable cash; the second was rejected on the ground that the assessee had sold gold not because of the allied victory in sight but because he found the gold unprofitable by reason of the fall in its price and the third was rejected as the assessee had failed to make good the pressing necessities alleged by him. The High Court further held that the findings given by the Appellate Tribunal were all findings of fact and as they could not be said to have been arrived at without any evidence they could not be interfered with in a Reference under s. 66(2), and answered the questions as to the two surplus amounts of Rs. 13 lacs and odd and Rs. 33 thousand 'and odd as liable to assessment. In regard to the excess of Rs. 88,522/- resulting from the sale of Karanpura shares, the High Court agreed with the Tribunal that that amount also was rightly brought to tax. It held that the finding of the Tribunal that the purchase of these shares was not in pursuance of a scheme to obtain control in the company and that the assessee's scheme for that purpose was to acquire shares representing the unissued capital of the company was one of fact with which also it had no jurisdiction to interfere.

Counsel for the appellant disputed the correctness of the High Court's judgment and contended: (1) that it was in error in declining to go into the correctness of the findings of the Tribunal by merely stating that they were findings of fact, (2) that the question whether a particular item was a trading profit or capital accretion depended on the intention on the part of the assessee at the time of the transaction in question and which had

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to be arrived at by an inference from established facts and was, therefore, a mixed question of fact and law, (3) that on the facts and circumstances, the Tribunal, and following it the High Court, was in error in treating the gold and the Karanpura shares as the stock-in-trade of the assessee for his alleged trading activities, (4) that the onus of proving that the activities of the assessee amounted to activities in the nature of trade or business was on the department and particularly so, as the Tribunal in the earlier assessments had come to a contrary conclusion, and (5) that the facts and circumstances as accepted by the Tribunal in its Statement of Case showed that the purchases of gold and share were made without any intention at that time to resell them at profit, and that therefore, the subsequent sales thereof would not stamp those transactions with the character of trade or business in them.

Since these appeals arise out of References under s. 66(2), we cannot exercise any wider power of interference than that permitted to the High Court under the Act. That was not disputed by Mr. Desai. But in support of his contention that this was a case where the High Court could and should have interfered with the Tribunal's findings he cited a number of decisions. It is not necessary to go into all these decisions as the principles on which such interference can be made and the scope of power under s. 66 to do so are by now well established. That the question, whether an assessee carries on business or whether certain transactions are in the course of business or whether they amount to adventures in the nature of trade or business, is a mixed question of fact and law is well-settled. The decision in Venkataswami Naidu & Co. v. C. I. T. (1) is an instance in point where this Court observed that the

expression 'adventure in the nature of trade' appearing in the definition of 'business' implies the existence of certain elements in the adventure which in law would invest it with the character of trade and that renders the question whether a transaction 'is in the nature of trade' a mixed question of law and fact and the High Court in such a case would interfere if the Tribunal had misdirected itself in law of 'also Liquidators of Pursa Ltd. rs. C.I.T.)(2). But to distinguish a question of fact and a question of law is not always easy, for, sometimes there is a common area between the two and though a mere question of fact can be turned into one of law, care should be taken against a finding of a mixed question of fact and law being given the unassailability which the Act confers on a pure finding of fact. The case of Sree Menakshi Mills Ltd. v.C. 1. T.(3) holds that where an ultimate finding on an issue is an inference to be drawn from facts found, on application of a principle of law, there is a mixed question of law and fact and such an inference in such a

(1) (1959) 35 I.T.R. 594 at 603 to 604. (2) (1954) 25 I.T.R. 265. (3) (1957) 31 I.T.R. 28.

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case is a question of law open to review by the court. On the other hand, when the final determination of the issue does not involve any application of a principle of law, an inference is a pure inference of fact drawn from the other basic facts. Such an inference can be attacked only if there is no evidence to support it, or, if it is perverse. Since the expression 'adventure in the nature of trade' implies the existence of certain elements in the transactions which in law would invest them with the character of trade or business and the question on that account becomes a mixed question of law and fact, the Court can review the Tribunal's finding if it has misdirected itself in law.

It is fairly clear that where a person in selling his investment realises an enhanced price, the excess over his purchase price is not profit assessable to tax But it would be so, if what is done is not a mere realisation of the investment but an act done for making profits. The distinction between the two types of transactions is not always easy to make The distinction whether the transaction is of one kind or the other depends on the question whether the excess was an enhancement of the value by realising a security or a gain in an operation of profit making. If the transaction is in the ordinary line of the 'assessee's business there would hardly be any difficulty in concluding that it was a trading transaction, but where it is not, the facts must be properly assessed to discover whether it was in the nature of trade. The surplus realised on the sale of shares, for instance, would be capital if the assessee is an ordinary investor realising his holding; but it would be revenue, if he deals with them as an adventure in the nature of trade. The fact that the original purchase was made with the intention to resell if an enhanced price could be obtained is by itself not enough but in conjunction with the conduct of the assessee and other circumstances it may point to the trading character of the transaction. For instance, an 'assessee may invest his capital in shares with the intention to resell them if in future their sale may bring in higher price. Such an investment, though motivated by a possibility of enhanced value, does not render the investment a transaction in the nature of trade. The test often applied is, has the assessee made his shares and securities the stock-in-trade of a business.

Though the assessee was at the material time a landholder of a large estate, that fact by itself would not mean that his transactions in shares, securities and bullion cannot be transactions in the nature of trade. They had, therefore, to be examined in the light of all the facts and circumstances to ascertain whether they had been entered into in pursuit of a trading activity. The first relevant fact is that the assessee's occupation was that of a landholder, having, on attaining majority, a considerable amount of money available for raising income therefrom. The transactions

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in question were obviously not in the line of any business or trade carried on by him. Since the Tribunal came to a conclusion as regards the nature of the assessee's transactions different from that arrived at earlier, it would be useful to tabulate them at one place. So tabulated, they are as follows:

(1) Sale of Government securities in 1938-39 which realised Rs. 44.25 lacs;

(2) Opening of an account with this and certain other amounts totaling Rs. 48 lacs in the Imperial Bank;

(3) Purchase out of these funds, shares and debentures of the value of Rs. 34.14 lacs in September 1939;

(4) Sale in October 1939, i.e., within a month, of some of these shares bringing him Rs. 5.75 lacs;

(5) Sale of the bulk of the shares in 1940 bringing in Rs. 29.58 lacs;

(6) Sale of the remaining shares in 1941 resulting in a small deficit;

(7) Purchase of 68,109 tolas of gold in June 1940 for Rs. 28.47 lacs;

(8) Sale of the bulk of the gold, i.e., 55,495 tolas in October 1944 resulting in a surplus of Rs. 13 lacs and odd;

(9) Sale of the remaining gold in October 1945 resulting in a surplus of Rs. 33,481/-;

(10) Purchase of Karanpura shares between December 1944 and April 1945 of the value of Rs. 2,37,267/-;

(11) Purchase of Victory Bonds in January 1945 of Rs. 14 lacs, and sale thereof in March 1945;

(12) Borrowing Rs. 5.10 lacs against gold in 1945-46;

(13) Purchase of Bokaro Ramgur shares in 1945-46 for Rs. 39.81 lacs and

(14) Sale of Karanpura shares in 1945-46 bringing in a surplus of Rs. 88,000 and odd.

As already stated, though these transactions were not in the line of any trade or business carried on by the assessee, nonetheless, if they possess the characteristics of adventures in the nature of trade, the profits resulting therefrom would be liable to tax. But in an enquiry on the question whether these transactions were in the nature of trade or business, it would not be altogether irrelevant

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to notice that in 1938-39, when the assessee sold the Government securities, he sold the entire lot and invested the bulk of their sale proceeds in shares and debentures, i.e., as much as Rs. 34 lacs. The same features is present

also in his purchase of gold in 1940 and its disposal in 1944 and 1945 using its sale proceeds in buying shares, which, it must be remembered, were of two companies only. The transactions thus are not diversified nor are gradual according to the opportunities offered by fluctuating market prices, but are in bulk and almost at a time, which ordinarily are not the characteristics of the dealings of a person carrying on trade or business in them. Thus, in 1938-39 all Government securities were sold and the bulk of their sale proceeds, i.e. Rs. 34 lacs and odd, used in the purchase of shares. The same was the case when gold was bought and sold. Furthermore, when a person trades in shares and debentures, he does not ordinarily buy shares of two companies only, except when a particular script has the possibility of giving an unusual or a certain profit. There was nothing on record to show, nor did the Tribunal find, that that was the case with the shares of either of the two companies whose shares the assessee purchased in such large quantity. Prima facie these transactions would appear in the nature of investments and their conversion into what the assessee believed to be better investments as the circumstances changed from time to time.

In support of his contention that these transactions were not in the nature of trade or business, the assessee had relied on the correspondence between him on the one hand and his bankers and brokers on the other, which had satisfied the Tribunal previously with reference to the assessment years 1939-40 to 1941-42. That correspondence lends support to the assessee's case inasmuch as he had there in clearly instructed his brokers to invest the sale proceeds of the said Government securities in such a way as to give him an annual yield of net 7%. There can be no doubt that Government securities were sold accordingly and shares of certain companies were purchased from their sale proceeds in accordance with the advice of his brokers and bankers. When it was found that certain shares so purchased were not likely to yield the percentage he desired, they were sold within hardly a month from their purchase. The circumstances in which these transactions were brought about, would disclose, as was held by the previous Tribunal in the case of the earlier assessments, that the assessee's intention then was to change his investments from Government securities into shares and debentures which, he was advised, would procure him a better yield. This conclusion is consistent with his sale of the entire lot of Government securities 'at a time, his going in for shares with their sale proceeds and the sale in October 1939 of certain shares which were found incapable of giving the return he desired.

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Since the present Tribunal had the advantage of examining the assessee's transactions during the whole of the period, i.e., right from 1938-39 to 1944-45 and thus have a more comprehensive picture of all the transactions, there would be no bar to its coming to a conclusion different from that arrived at in the earlier years, if the acts and conduct of the assessee taken as a whole throughout the period pointed to, a different conclusion as both the Tribunal and the High Court have said. But the only new materials pointed out by the Tribunal from which a different conclusion could be arrived at were (1) the sale of gold in 1944 and 1945, (2) the purchase of the said shares from its sale proceeds, and (3) the sale of Karanpura shares.

The question, therefore, the Tribunal had before it was, whether when the assessee purchased the gold he did so

with the intention to deal in it. The Tribunal held, and the High Court concurred with it, that the assessee's transactions showed that they were in the nature of trading transactions. Two facts, however, throw considerable doubt on the validity of that conclusion and neither the Tribunal nor the High Court seems to have weighed them with the consideration which they demand. The first fact is that in 1940 he converted his entire share-holding into gold, a fact consistent with his case that he did so because of the nervousness engendered by the breaking out of the Second World War, the initial German victories and the fall of France. The Tribunal did not countenance this case for it thought that if that was so, the assessee would have invested the other cash lying with him also in gold, and secondly because according to it the war panic started in 1942 and not in 1940. We do not think that this was an accurate 'approach. The fact that the assessee did not invest all his cash cannot mean, as the Tribunal thought, that his case about the purchase of gold was not correct. The war had commenced in 1939 and it is a notorious fact that in 1940 the fortunes of the allies were none too bright. The fact was that the assessee sold his entire share-holding and applied their sale proceeds and also a further amount of Rs. 13 lacs and odd obtained from his lessees, M/s Anderson Wright & Co., into gold. The second fact, whose significance does not also seem to have been adequately apprehended, was that the assessee, who started with the plan of getting at least net 7% yield, put a very large part of his funds into gold, an altogether sterile security, and retained that gold in his family vaults for nearly 4 years. The Tribunal had before it the gold prices current during the years 1940 to 1944. These indicate that the gold price remain steady at Rs. 42 per tola all throughout 1940. There was, however, an upward trend noticeable from about the end of 1941 which went up to Rs. 65 towards the end of 1942. By the middle of 1943 the gold price had risen to Rs. 90 and even more. In October 1944, when the assessee sold

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a large bulk of his gold holding the price was at Rs. 68 per tola. If the idea of the assessee in purchasing the gold was to trade in it, he would not have waited for 4 years without disposing of a particle of it. The price was on the upward trend in 1941 and reached the climax in 1943 when he could have sold the gold and made considerable gain. The fact that he did not do so and waited until October 1944 the war fortunes were turning in favour of the allies, that confidence had gradually been regained by trading circles and that that was why he thought that it was no longer necessary for him to retain the gold any further and could safely invest his money in income-bearing securities. The further fact that he sold practically the whole of his stock of gold in October 1944 instead of selling it bit by bit when the price was rising since about the end of 1942 is inconsistent with the hypothesis that the object with which the gold was purchased was to trade in it.

Regarding share transactions, we think that the Tribunal placed undue emphasis on the fact that when he opened the bank account in March 1939 with the sale proceeds of Government securities, he did so, firstly, in the name of his wife 'and, secondly, called that account as one of "Rs. 48 lacs floating in the share market". The first had no particular significance and the second properly viewed only meant that he wanted to set apart this fund for transactions in shares and securities and not mix up his other capital

and the income arising from his estate. The name he gave' to this account cannot for that reason only render his dealing with that account into trading transactions if otherwise, they were not.

Similarly, the Tribunal was unduly impressed by the fact that he sold away the Victory Bonds within about two months from their purchase. The correspondence produced by the assessee clearly shows that he had bought those Bonds at the pressure of the then Commissioner. The Bonds were not likely to fetch him the yield he desired. His purchase of them had thus served the purpose, viz., his showing to the authorities that his estate had made a war contribution. The sale by him of those Bonds would not affect the Government or its war effort. The fact that he sold' them soon after the purchase would not invest it with the stamp of' trade or business in Victory Bonds.

As regards the Karanpura shares, the correspondence between him and the company and the advice he had from his brokers referred to in the Statement of Case show that the assessee did at one time entertain the idea of obtaining control over the company's management by procuring 51% of its total shares. He could do so by purchasing shares in the open market and also, by other means. He purchased 7,025 shares in the market but that, was clearly not enough. There was at that time litigation going on_

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between him and the company and he seems to have hit upon the idea that he would compromise his suit if the managing agents of the company were to sell him shares representing its unissued capital at prices offered by him. The object of his offer was that he would not have to pay the market price of the shares which was 3 times more than the one offered 'by him. The company did not agree and his move for compromise, failed. According to him, there was, therefore, no useful purpose for retaining those shares and he sold 6,950 shares leaving only 75 shares with him. On these facts the Tribunal was not right in concluding that the shares which the assessee purchased from the market were not for the purpose of acquiring the major share-holding in the company and that the control over the company was to be obtained only by purchasing shares representing the unissued capital. Both the purchase of shares and the move to obtain shares representing the unissued capital were part of the same design and if the latter 'failed, his purchase of 7,025 shares would obviously not bring him nearer his object. Furthermore, the bulk of the sale proceeds of gold went into the purchase of Bokaro. Ramgur shares which remained with him till the assessment years in question. The profits made on the sale of shares, acquired with the intention of obtaining control over the company's management and not for dealing in them, would be on the capital and not revenue account. (see Kishan Prasad & Co. Ltd. v.C.I.T.(1) and C.I.T. v. National Finance Ltd. (2). The Statement of Case itself set out facts which were consistent with the assessee's case.

In our view the Tribunal misdirected itself in applying the law to the facts, found by it both in the matter of gold and shares, and the High Court would have been entitled to interfere with its findings instead of holding that it could not do so as the findings were findings of fact. The questions involved being mixed questions of fact and law, the hypothesis on which the High Court acted that the findings were purely findings of fact and therefore 'were unassailable was in our view not correct.

The appeals, therefore, will have to be allowed and the

answers given by the High Court set aside. We hold that the two questions referred to the High Court should have been answered in assessee's favour and we do so accordingly. The respondent will pay to the appellant costs of these appeals but only one hearing fee.

(3.C. Appeal allowed.

(1) (1955) 27 I.T.R. 49. (2) (1962) 44 I.T.R. 788.

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JUDIS