Mayfair Estates (P.) Ltd. Vs Commissioner of Income Tax

Court: Calcutta High Court

Date of Decision: Aug. 14, 1961

Acts Referred: Income Tax Act, 1961 â€" Section 10, 10, 11, 12, 2(15)

Citation: (1963) 48 ITR 217

Hon'ble Judges: P.B. Mukharji, J; Niyogi, J

Bench: Division Bench

Advocate: R.B. Pal and N.C. Talukdar, for the Appellant;B.L. Pal, for the Respondent

Judgement

P.B. Mukharji, J.
The following reference u/s 66(2) of the income tax Act was directed by this court upon the Tribunal for a decision of

the question:

Whether on a true construction of the memorandum of association of the company as well as the facts and circumstances of the case the sum of

Rs. 1,00,673 was liable to assessment u/s 10 of the Act as income under the head "business"?

This was at the instance of the assessee, a private limited company by the name Mayfair Estates Ltd., Calcutta, incorporated in 1935.

2. The facts as found in the statement of case may be briefly stated: In the year 1935, being the year of incorporation, the assessee company

purchased in one block certain buildings and a substantial portion of the purchase money was found by raising a loan on the security of these

properties in Mayfair Road, Calcutta. Within four years of the incorporation, the company sold away in 1939 one of the properties and again,

within a period of three years therefrom, the company sold four other properties in 1942. The difference of Rs. 1,328 between the purchase price

and the sale price for the first sale in 1939 was assessed to income tax for the year 1940-41. The sale of the properties in 1942 produced an

income of Rs. 2,40,000 and a surplus of Rs. 1,00,673 was made after deducting the cost price, law charges, brokerage, etc., all aggregating to

Rs. 1,39,327. The income tax Officer brought this surplus to tax.

3. The four properties that were sold in 1942 were Nos. 3 and 5, Mayfair Road, and Nos. 1 and 1/1, Old Ballygunge Road.

4. The assessee then appealed to the Appellate Assistant Commissioner who upheld the decision of the income tax Officer finding that the sum of

Rs. 1,00,673 has been rightly assessed as a business income. The Appellate Assistant Commissioner further points out the circumstances of the

first sale by finding that the assessee made an appeal against the 1940-41 assessment on a similar ground when the assessee sold 19, Raja Santosh

Road, and when a surplus balance of Rs. 1,328 in respect thereof was assessed by the income tax Officer as a business profit in 1940-41. The

assessee even at that stage appealed to the Tribunal contending that it was not a business profit but was a capital receipt but the Tribunal held that

this was a part of the activities of the company itself and as such the amount was taxable. The matter ended there so far as the first sale was

concerned. From the decision of the Appellate Assistant Commissioner, the assessee in the present case appealed to the Appellate Tribunal. The

main contention of the assessee before the Tribunal was that the income should have been held as a casual receipt or a capital gain. It was

contended by the assessee that it was not a dealer in property or houses and the sale was not an adventure in the nature of trade. The Tribunal

upheld the decision of the Appellate Assistant Commissioner and dismissed the appeal of the assessee. The decision of the Tribunal holding that

this sum of Rs. 1,00,673 was the net profit of the sale transaction and was a business income rests on a number of cogent considerations, namely:

(1) the objects of the company in the memorandum of association justify sale or traffic in house and other property; (2) actual sales took place

almost from the early stages of the company"s incorporation; (3) failure of the assessee to prove that the sale proceeds in respect of these

properties were reinvested and, therefore, should be regarded as change of investments; and (4) failure of the assessee to prove that these

properties were sold to pay off a mortgage.

5. It was contended before the Tribunal by the assessee that the sale of the four houses was only for changing its investments. Nothing is proved or

shown to establish what, if at all, was the form of the new investment after changing the old investment in house property. It Was also contended

by the assessee before the Tribunal that the sale of those house properties which were purchased with money obtained by loan and mortgage was

effected with a view to pay off the mortgagee who was pressing for payment. Opportunity was given to the assessee to prove that fact, but the

assessee failed to produce any material to support such a statement. We have no doubt in our mind that if a limited company such as the assessee

had paid off a mortgage of over Rs. 2,00,000 it would have at least receipts, cheques and other documents to show that such payments were

made. It is also established on record that the assessee conceded that these four house properties were fetching good rent and, therefore, it could

not be said that there was any need for selling them. On behalf of the department it was contended that the assessee took advantage of the war

period to earn this large profit in 1942 by sale of these four houses in accordance with the declared object of the assessee in its memorandum of

association.

6. Dr. Pal, learned counsel for the assessee, has put forward the same contentions that were presented before the Tribunal. He contends that the

receipt of this surplus is a capital receipt or a casual receipt. The reasons which he advances in support of his contention are : firstly, that this

company''s main business is to hold properties and to let them out on rent and earn an income from such rents and is, therefore, an assessee u/s g

of the income tax Act from the source "" income from property ""; secondly, his reason is that the company has not purchased any other property

but only sold some. Therefore, he argues that where there are no corresponding purchases to match with the sales effected in this case it could not

be said that the sale represented ordinary trading; and, thirdly, he submits that the assessee company has sold only a small portion of its properties

and continues to hold as a property-owner the larger bulk of this real estate. These are the three reasons submitted before us by Dr. Pal in support

of his contention that the sum of Rs. 1,00,673 in this case is not an income under the head ""business"" but a capital receipt.

7. The first reason of Dr. Pal can be disposed of briefly. The fact that certain items of the assessee''s income are assessed under the head

property"" u/s 9 of the income tax Act cannot determine that another item, namely, the receipt of Rs. 1,00,673 in this case, cannot be an income

from another source, namely, ""business"" u/s 10 of the income tax Act. income tax is one single tax charged in respect of the total income of the

previous year of the assessee. Section 2(15) of the income tax Act defines ""total income"" to mean total amount of income, profits and gains

referred to in section 4(1) of the Act and computed in the manner laid down in the income tax Act. Section 6 enumerates the various heads of

income, profits and gains which are chargeable to income tax and appears in Chapter III of the income tax Act under the heading ""taxable income"".

It is now well settled that sections 7 to 12 of the income tax Act under Chapter III direct the modes in which the income tax is to be levied and

computed. An assessee''s income may come from different sources and heads and they will be computed and assessed under such different heads.

The fact, therefore, that a particular source of income comes u/s 9 of the income tax Act cannot mean that another item could not come under a

different source of income u/s 10 of the income tax Act. The point, in our view, is concluded and answered by the Supreme Court in United

Commercial Bank Ltd. Vs. Commissioner of Income Tax, West Bengal, and specially the observation at pages 702 to 703. We are, therefore,

unable to uphold the first reasoning of Dr. Pal. This court holds that income tax is only one tax levied on the sum total of the income classified and

computed under various heads. That it is not a collection of different taxes on each separate head of income, is a principle which is well settled

both here and in England: see the observations of the House of Lords in Attorney-General v. London County Council [1900] 4 Tax Cas. 265 and

Salisbury House Estate Ltd. v. Fry (H.M. Inspector of Taxes) [1930] 15 Tax Cas. 266.

8. Dr. Pal"s next submission is based on the English decision in Glasgow Heritable Trust Ltd. v. Commissioners of Inland Revenue [1953] 35 Tax

Cas. 196. It is a complicated case where there was more than one order for additional statements by the court from the income tax authorities. The

main use of the case which Dr. Pal made was to emphasize that property-owning was not trade and that mere realisation of capital asset was not

trade and for that purpose he relied on the observation to that effect by the Lord President Cooper at page 215 of that report. It may not be out of

place to open the discussion on this point by quoting the wholesome caution of Lord President Cooper himself in that case at page 212, where the

following observations were made:

When the choice lies between concluding that a given series of transactions (a) amounted only to the realisation of capital assets or (b) involved

''acts of realisation done in what is truly the carrying out or carrying on of a trade'' the question must be a mixed question of fact and of law. As

scores of reported decisions demonstrate, the conclusion to be drawn from the facts is often balanced upon a knife edge, and when such cases

come before an Appellate Tribunal, the validity of the Commissioners'' conclusions have always been examined from the standpoint of (i) enquiring

whether there was evidence to support them, and (ii) of testing the correctness of the reasons, if any, given by the Commissioners for the

conclusion which they reached.

9. The majority decision in Glasgow Heritable Trust''s case (supra) came to the conclusion that there was the evidence on which the

Commissioners were entitled to find that the sales effected by the company were made in the course of a trade carried on by it. Lord Russell who

was in the minority disagreed with the view that there was no evidence to support the Commissioners'' view.

10. Although balancing upon ''"a knife edge"'' is always a difficult task as pointed out by Lord President Cooper himself, all that we need say about

the case of Glasgow Heritable Trust Ltd.''s case (supra) is that it is distinguishable on broad grounds of fact from the present reference before us.

As pointed out by Lord President Cooper at pages 213 and 214 of that report (1) there the company was formed ""to hold and realise"" the

properties; (2) the company''s enterprise was very different from the enterprise of the firm whose business it took over only to salvage as much of

the ruins of the partnership business as could be done. The company in that case never built or acquired any property and never developed the

properties which they took over. No alterations were ever made with a view to sale and the properties were never advertised for sale. As Lord

President points out at page 214 of the report, the company simply ""nursed"" the properties; (3) the proceeds of sales were all in repays ment of the

heritable debts and nothing from that source had ever been distributed or treated in the accounts as profits available for dividend. In fact, Lord

Carmont, who formed the majority with Lord President Cooper in that case, clearly points out at page 217 of that report that the Special

Commissioners ""allowed their minds to be warped by their insisting on the actings of the individuals or the partnership which formerly dealt with

properties which are not held by the company.

11. Now if that is the finding of fact in that case that the company was a company only ""to hold and realise properties"", then the decision in

Glasgow Heritable Trust''s case (supra) follows as a matter of course that the receipt in such a case could not be said to be a trading receipt, for

the company there was not trading in properties. But the facts before us are very different. It is quite impossible to hold on the facts of this case

that the present assessee company was formed only to hold and realise properties. Not only the memorandum of association and objects but also

the actual business of the assessee prove and establish beyond doubt that the assessee carries on the business of trading in properties by sale.

12. Clause 3(1) of the objects of the company expressly confers upon the assessee company the power ""to traffic in land and house and other

property of any tenure and any interest therein"", ""to sell and deal in freehold and leasehold ground rents"", and ""generally to deal in, traffic by way of

sale, lease, exchange or otherwise with land and house property"". Clause 3(2) of the objects in the memorandum of association also gives power

to the assessee company to acquire by purchase lands, buildings, etc., and to turn the same to account as may seem expedient. Lastly, clauses

3(28) and (31) give power to the assessee company to sell or dispose of or otherwise deal with all or any property and rights of the company.

13. It follows, therefore, from the memorandum of association in this reference and on the facts of this case that this company has as its ordinary

trading activity sale of land and house properties. What has happened in this case is the sale of four of its properties. Prima facie, therefore, this is

within their ordinary declared trade activities. It is not a company as in Glasgow Heritable Trust case (supra) to ""only"" hold and realise properties

and was not an investment company at all. The only relevant clause for investment in this memorandum of association is clause 3(20), which gives

power to the company to invest the moneys of the company not immediately required upon such securities and in such manner as may from time to

time be determined. This is an investment clause dealing only with surplus. That does not make it an investment company. In support of this

construction reference may be made to Granville Building Co. Ltd. v. Oxby (H.M. Inspector of Taxes) [1954] 35 Tax Cas. 245, where Harman

J., at page 249, after construing the words ""turning to account"" as not being indicative of an object of an investment at all, proceeds further to say

that the only power to invest is a power to invest money not immediately required. That did not make the company an investment company either

according to Harman J.

14. The Supreme Court in G. Venkataswami Naidu and Co. Vs. The Commissioner of Income Tax, has laid down the guiding principles, with the

caution, at page 609:

...it is impossible to evolve any formula which can be applied in determining the character of isolated transactions which come before the courts in

tax proceedings. It would besides be inexpedient to make any attempt to evolve such a rule or formula. Generally speaking, it would not be difficult

to decide whether a given transaction is an adventure in the nature of trade or not. It is the cases on the border line that cause difficulty.

15. The second principle which the Supreme Court laid down in the same case at page 609 is:

The presence of all the relevant circumstances mentioned in any of them may help the court to draw a similar inference; but it is not a matter of

merely counting the number of facts and circumstances pro and con; what is important to consider is their distinctive character. In each case, it is

the total effect of all relevant factors and circumstances that determines the character of the transaction.

16. In that case the Supreme Court came to the conclusion that the transaction in question was an adventure in the nature of a trade. The property

purchased and resold in that case was land. The contention there raised by the counsel for the assessee was that the four purchases made by the

assessee represented nothing more than an investment and if resale had produced some profit that could not impress the transaction with the

character and nature of trade. One of the facts that weighed with the Supreme Court in that case in coming to the conclusion was that the assessee

was a firm and that it was not a part of its business to make investment in land. Secondly, the Supreme Court in that case, on the facts, points out

that a firm like the appellant was not acquiring land for the mere pride of possession and proceeds to observe at page 623:

It is really not one transaction of purchase and resale. It is a series of four transactions undertaken by the appellant in pursuance of a scheme and it

was after the appellant had consolidated its holding that at a convenient time it sold the lands to the Janardana Mills in two lots.

17. Then again the Supreme Court at page 624 of the report comes to the conclusion:

Thus the appellant purchased the four plots during the two years with the sole intention to sell them to the mills at a profit and this intention raises a

strong presumption in favour of the view taken by the Tribunal.

18. The facts in this case are very much more against the assessee than those of the Supreme Court. Here is a company dealing with and trafficking

in real property and real estates. Not only its memorandum of objects and articles of association but also its actual conduct in selling one property

within four years of its incorporation and four other properties within three years thereafter show that this was not a company formed only to hold

and realise properties or that it never built or acquired or developed any property as was said by Lord President Cooper in Glasgow Heritable

Trust Ltd. [1953] 35 Tax Cas. 196 nor can it be said to have been proved in this case that the proceeds of sale were used for repayment of debts

as was said in Glasgow Heritable Trust''s case (supra).

19. On behalf of the Commissioner of income tax reliance has been placed on the English decision in Commissioners of Inland Revenue v. Toll

Property Co. Ltd. [1952] 34 Tax Cas. 13 There, the assessee company was formed in 1942 and soon after its formation bought one property

consisting of shops and tenements. The purchase and the sale of property were within the objects of the company, as set out in its memorandum of

association. In 1946, part of this property was sold at a profit which was assessed to income tax. Three years later, in 1949, the remainder of the

property was sold at a profit and in 1950 the company went into liquidation having owned only the one property. Whilst it held the property the

company derived an income from it The General Commissioners considered that the profit in 1949 was an appreciation of a capital asset and

decided that the purchase and sale were not in the nature of trade. But the Court of Session held that the purchase and sale of the property were

an adventure in the nature of trade, the profit on which was assessable to income tax. The objects in the memorandum of association of that

company permitted purchase, sale and traffic in property almost in the same way as the objects of the assessee company here before us. Lord

President Cooper at page 18 of that report rejected the two reasons given by the Commissioners in the following terms:

The majority of the Commissioners have given the reasons for their view in two propositions, first, that the company was a distinct legal persona,

and second, that the company had derived an income from this isolated property transaction for a number of years, and from this they conclude

that the transaction was an investment. For myself, I cannot see the necessary relevance of either of the factors founded upon, and I am certain that

they are not conclusive in favour of the result which the majority of the Commissioners have reached. The question is of course a question of

circumstances and of degree, and there is no justification for reversing the opinion of the majority of the Commissioners if they did not misdirect

themselves in law, or misapprehend the effect of the terms of the statute, or proceed without evidence sufficient in law to justify their conclusion.

20. This partially meets the argument advanced by Dr. Pal that here in this case also four properties which were sold were supposed to fetch

income for seven years prior to the sale by way of rent and as pointed out by Lord President Cooper that this factor is not conclusive in favour of

the assessee.

21. In that case also the company spent money on alteration and repairs of that property and demolished some portion of this property which had

been condemned before as dangerous. Speaking again at pages 18-19 of the report, Lord President Cooper observed:

Keeping in view the nature of the transaction, the purpose with which the company was floated and the objects which were prescribed in the

memorandum of association, and the whole of the other circumstances which I have briefly summarised, it seems to me that the majority of the

Commissioners were not entitled to reach the conclusion which they did, that they must have misdirected themselves in law, and that the true and

only reasonable conclusion on the facts found is the conclusion reached by the dissenting Commissioner.

22. Lord Carmont at page 19 of the report said:

Notwithstanding that it was only a single transaction, having regard to the purpose of the formation of the company as stated by Mr. Allison, I think

it was the inevitable conclusion that the transaction was an adventure in the nature of trade...

23. Here this is not a case of a single transaction at all but sale of as many as four houses producing an income of Rs. 2,40,000 and a surplus

income of Rs. 1,00,673. The number of sales in this case and the frequency with which they have taken place read with the declared objects of the

memorandum of association leave little room for doubt that this surplus of Rs. 1,00,673 is a trading and not a capital receipt on the facts of this

case before us.

24. It will be appropriate here also to deal with another Supreme Court decision cited at the Bar, namely, Saroj Kumar Mazumdar Vs. The

Commissioner of Income Tax, West Bengal, Calcutta, . It was held there that one single transaction was, on the facts of that case, not an

adventure in the nature of trade. Bhagwati and Sinha JJ., who delivered the majority judgment, emphasized that, ""where a transaction was not in

the line of the business of the assessee but was an isolated or a single instance of a transaction, the onus was on the department to prove that that

transaction was an adventure in the nature of trade "". Kapur J. gave a dissenting judgment. There are many distinguishing features of that case

which will be clear from a perusal of the report at page 249. The assessee there was engaged in various types of business, as a shareholder and a

director in limited liability concerns, as also in building contracts, but dealing in landed estates was not in the line of his business at all. Admittedly,

there, the transaction in question was the only one of its kind, out of which the assessee made a considerable profit which was found by the

Supreme Court to have been ""in the nature of a windfall"". It was also found as a fact by the Supreme Court that there was no clear evidence to

support the inference that the land in that case was purchased with the sole intention of selling it later at a profit. These facts distinguish the present

reference before us. The assessee''s business and its declared object is to sell immoveable property in the present case before us. Secondly, the

assessee had done it before in 1939 and was assessed to income tax on the profits of that sale in 1939 and although he had objected to that

assessment his objection was overruled. Now, in the present assessment in question before us, for the year 1943-44, admittedly, a large profit had

been made. In Saroj Kumar Mazumdar''s case (supra) also, at page 248, the Supreme Court reiterated the view that each case must be

determined on the total impression created on the mind of the court by all the facts and circumstances disclosed in the particular case and went so

far as to say, ""Hence, no decided case can, strictly speaking, be a precedent which could govern the decision of a later case, involving a similar

question.

25. We need not notice the case of Commissioners of Inland Revenue v. Reinhold [1953] 34 Tax Cas. 389 as the Supreme Court in G.

Venkataswami Naidu and Co. Vs. The Commissioner of Income Tax, observed:

This case was no doubt a case on the border line; and if we may say so with respect it was perhaps nearer an adventure in the nature of trade than

otherwise.

26. There are, however, one or two other English cases to which reference may be made and which were cited by the learned counsel for the

Commissioner of income tax. In Emro Investments Ltd. v. Alter (H.M. Inspector of Taxes) [1954] 35 Tax Cas. 305, somewhat similar questions

arose out of formation of certain companies by an estate agent. Two assessee companies were formed in 1943 and 1944 of which the estate agent

became the managing director. The two companies followed his advice regarding sales and purchases of property. In the case of the second

company moneys realised from the sale of capital assets in excess of their price in the books were required by the articles of the company to be

carried to a capital reserve fund which was not available for dividend and in the case of the first company such receipts were in practice dealt with

in the same way. All profits on the sale of property were used to buy further properties or invested in mortgages or other securities. A number of

purchases and sales took place between 1943 and 1951. The main contention of the companies was that they were investment companies and had

never carried on a trade. The Commissioners, on the other hand, found as a fact in each case that the company was carrying on the trade or

business of buying and selling properties with a view to profit. The Chancery Division Bench of the High Court in London upheld the

Commissioners" decision. Wynn-Parry J., at page 310 of that report, noticed the number of sales during the period of years and observed:

Figures such as those must at once lead the enquiring mind to wonder whether or not a business of dealing in properties is going on...."" That

therefore is a relevant factor. Here the number of sales and their frequency, although do not in any way equal the number of sales and their

frequency found in Emro Investments case (supra) nevertheless we have found them fairly large and frequent in the present case before us. In

Mitchell Bros. v. Tomlinson (H.M. Inspector of Taxes) [1957] 37 Tax Cas. 224, Danckwerts J. at page 230 observed:

There are ample facts upon which the Commissioners could infer an intention to depart from their policy of investment and retaining the houses for

purposes of investment, but instead to take advantage of the opportunities provided for making profit in the conditions which existed after the

termination of the war and indulge in an adventure in the nature of a trade by making profits out of the purchase and sale of land. It seems to me

impossible for me to say there was no evidence on which the Commissioners could reach that conclusion....

27. Lord Goddard C.J. in appeal upheld this decision. The only importance of this decision lies in the fact that the company also was to let their

houses and not to sell them but even then that was not regarded as a conclusive factor and it was found that the company as a matter of fact had

changed its policy by reason of the events and facts found.

28. The last case which was cited on behalf of the Commissioner of income tax was James Hobson & Sons Ltd. v. Newall (H.M. Inspector of

Taxes) [1957] 37 Tax Cas. 609. There also the sale proceeds of an immovable property were assessed to income tax and the assessee company

contended that they did not form part of its trading assets. The Commissioners'' decision was upheld by the High Court in London in its Chancery

Division. Hatman J., at page 617, made the following observations, which are relevant for the purposes of our reference:

In this case the memorandum would entitle the company to buy houses as an investment, but I do not think it would entitle it to build houses as an

investment. It entitled the company to build houses in order to turn them to account, and that is what it did. It would be a misuse of language to

suggest that, simply because it did not intend to sell houses when it built them, therefore they were any different from any other houses which the

company built. They were all treated in the same way in the accounts, and although this is not decisive it is a straw in the wind. They show what the

intention of the company was. These were part of the stock-in-trade of this company, and no less its stock-in-trade because it was not intended to

turn them to account by selling them.

29. In this case, Harman J. noticed the many cases that cropped up in England about builders by making the observation at page 615 of the report:

There seems of recent years to have been a series of them. The question is always the same, whether houses owned by people carrying on or

having carried on the trade of builder and realised by them are part of their trading assets, so that the profits are part of their trade, or whether they

are something different, a so-called investment, that being a word of rather vague import but meaning something in which money is locked up so as

to be outside the trading activities of the company.

30. Harman J. points out again at page 616 on the facts of that case:

No attempt was made to sell them when built; they were retained and let. The company also had at least three other ventures, and may be more, in

building houses for prompt sale, and those ventures ended in leaving on their hands what apparently are called in the trade " builders'' remainders'',

that is to say, houses put up with the rest of the estate for sale and not sold.

31. Each case must, however, be decided on its own facts. No case is a real precedent for another on this vexed question. It will, therefore, be

unnecessary to notice any further cases on the point except the case of Commissioners of Inland Revenue v. Hyndland Investment Company Ltd.

[1929] 14 Tax Cas. 694, on which much reliance was placed by Dr. Pal. There, a company was formed in 1899 to purchase certain lands on

which, under contracts entered into by the vendors, five blocks of flats comprising forty flats were in the process of erection. The company

completed the building of the flats and let them to tenants. It acquired no other land. An offer to buy one block of flats was made to the company in

1902 but the negotiations fell through. Between 1920 and 1926 sixteen flats were sold separately. The memorandum of association of the

company stated as one of its objects the acquisition of land, etc., to hold as an investment, and as another object, the building of tenements, etc.,

with power to realise any of its property. The Commissioners took the view that the company had not traded but were merely realising capital. The

Crown appealed and the appeal of the Crown was dismissed. Lord President Clyde, at page 699, emphasized the fact that the memorandum of

association described its objects, as being the acquisition of land and other heritable property, and the holding of the property as an investment and

the division of the income thereof, but proceeded to observe:

That is not, however, conclusive, because the question is not what business does the taxpayer profess to carry on, but what business does he

actually carry on. At the same time it is not irrelevant to observe that, so far as the constituent documents of this particular company go, its objects

were not concerned with speculation in real property, but with the acquisition and management of permanent investments in house property and

similar subjects.

32. The facts in this case are very different from the facts in Hyndland Investment Co. Ltd."s case (supra). Here there is no question of any

investment as such; here not only the objects declare sale of property as one of the objects but actual sales took place and the taxpayer was

carrying on the business of selling property as part of its trade.

33. It, therefore, follows from the authorities, on the facts of the particular case before us, that Dr. Pal"s last argument that only a small portion of

the real estate was sold in this case cannot, on the facts and records of the present reference, take the sales either outside the objects of the

memorandum of association or outside the ordinary trading for making profit. The proportion of sale is not, however, merely nominal in this case. It

must be pointed out that the whole Mayfair Block was purchased for Rs. 5,85,264-4-0. The value of the four properties sold fetched as much as

Rs. 2,40,000. The total municipal valuation of the properties included in the Mayfair Block was Rs. 50,111 at the time of purchase, whereas at the

time of sale the total municipal valuation of the four properties sold alone amounted to Rs. 11,420, which is about 25 per cent. of the total

municipal valuation.

34. Lastly, Dr. Pal''s argument that the company in this case only sold properties but did not purchase any, cannot, in our view, take this sum out of

revenue. To be a trade it is not necessary that there must be simultaneous sales and purchases. If a real estate company such as the assessee

company here sells a portion of its properties to make a profit in a rising market it cannot be said that these profits were not part of their trading

when they are justified by their memorandum of association simply because they had made no corresponding purchases of properties also at the

same time or contemporaneously.

35. For these reasons we are of opinion that on a true construction of the memorandum of association of the company as well as the facts and

circumstances of the case the sum of Rs. 1,00,673 was liable to assessment u/s 10 of the Act as income under the head ""business"" and we answer

the question in the affirmative. The assessee will pay the costs of this reference.

Niyogi, J.

I agree.