BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

1954
Nov. 22, 23
1956
Oct. 16

AND

JAMES A. TAYLOR ..... RESPONDENT.

Revenue—Income tax—The Income Tax Act, 1948, S.C. 1948, c. 52, ss. 3, 5, 127(1)(e)—Meaning of term "adventure or concern in the nature of trade"—Negative and positive guides for determining whether transaction an adventure in the nature of trade—Purchase and sale of 1,500 tons of lead a dealing in lead and an adventure in the nature of trade.

The respondent was the president and general manager of The Canada Metal Company which was engaged in the business of fabricating various products of non-ferrous metals including lead. It was a wholly owned subsidiary of the National Lead Company of New York which controlled its business policy and restricted its purchases of raw metals to a 30-day supply. Moreover, it had to buy its lead requirements from a Canadian supplier which held it to a quota. The result was that it lost considerable export business. In 1949 lead prices broke sharply and lead from foreign countries was available for the first time at the lower prices. The respondent requested permission from the parent company to allow his company to import foreign lead which meant buying it for future delivery. It was contrary to the parent company's policy to allow its subsidiary to deal in futures and the requested permission was refused. The respondent then requested and was given permission to purchase the lead himself and assume the risk involved. He felt that he could get the foreign lead and could not get adequate supplies in Canada. He had the idea that his company needed the lead and decided to buy it himself, sell it to the company and assume personally whatever risk was involved in the transaction. Accordingly, he purchased 1,500 tons of foreign lead through brokers and arranged for its sale to his company at the market price of the lead on its delivery to it. The respondent made a profit on the transaction of $83,712.24 of which $70,098.80 was included in his income tax assessment for 1949, that being the amount of the profits received by him in that year. The respondent appealed to the Income Tax Appeal Board which allowed his appeal and the Minister appealed from its decision to this Court.

Held: That the terms "trade" and "adventure or concern in the nature of trade" are not synonymous expressions and that the profit from a transaction may be income from a business within the meaning of section 3 of the Act, by reason of the definition of business in section 127(1)(e), even although the transaction did not constitute a trade, provided that it was an adventure or concern in the nature of trade.

2. That there could be a "scheme of profit-making" within the meaning of the *Californian Copper Syndicate* case, even if there were only one transaction.

3. That the inclusion of the term "adventure or concern in the nature of trade" in the definition of "business" in section 127(1)(e) of the Act has substantially enlarged the ambit of the kind of transactions the profits from which were subject to income tax.

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4. That, while it is not possible to lay down any single criterion for deciding whether a particular transaction was an adventure of trade, it is possible to state some propositions of a negative nature and also to lay down some positive guides.

5. That the singleness or isolation of a transaction cannot be a test of whether it was an adventure in the nature of trade, that while it might be a very important factor in determining whether it was a trading or business transaction, it has no place at all in determining whether it was an adventure in the nature of trade and that it is the nature of the transaction, not its singleness or isolation, that is to be considered.

6. That it is not essential to a transaction being an adventure in the nature of trade that an organization be set up to carry it into effect or that anything should be done to the subject matter of the transaction to make it saleable.

7. That the fact that a transaction is different in nature from any of the other activities of the taxpayer and that he has never entered upon a transaction of that kind before or since does not, of itself, take it out of the category of being an adventure in the nature of trade.

8. That a transaction may be an adventure in the nature of trade although the person entering upon it did so without any intention to sell its subject matter at a profit, for the intention to make a profit may be just as much the purpose of an investment transaction as of a trading one. The considerations prompting the transaction may be of such a business nature as to invest it with the character of an adventure in the nature of trade even without any intention of making a profit on the sale of the purchased commodity.

9. That the taxpayer's declaration that he entered upon the transaction without any intention of making a profit on the sale of the purchased property should be scrutinized with care.

10. That care must be taken in applying English income tax decisions to a Canadian case.

11. That if a person deals with the commodity purchased by him in the same way as a dealer in it would ordinarily do such a dealing is a trading adventure.

12. That the nature and quantity of the subject matter of the transaction may be such as to exclude the possibility that its sale was the realization of an investment or otherwise of a capital nature, or that it could have been disposed of otherwise than as a trade transaction and may stamp the transaction as a trading venture.

13. That the respondent's purchase and sale of the 1,500 tons of lead was a dealing in lead and an adventure in the nature of trade within the meaning of section 127(1)(*e*) of the Act and that his profit from it was profit from a business within the meaning of section 3.

14. That the appeal must be allowed.

APPEAL from decision of the Income Tax Appeal Board.

The appeal was heard before the President of the Court at Toronto.

W. R. Jackett, Q.C., and *K. E. Eaton* for appellant.

J. R. Reycraft for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

THE PRESIDENT now (October 16, 1956) delivered the following judgment:

This is an appeal from the decision of the Income Tax Appeal Board[1], dated December 16, 1953, allowing the respondent's appeal against his income tax assessment for 1949, which included in his taxable income the amount of the profit made by him on the purchase and sale of 1500 tons of lead in that year.

The issue in the appeal is whether such profit was income from "an adventure or concern in the nature of trade" and, therefore, income from a "business" within the meaning of section 3 of *The Income Tax Act*, Statutes of Canada, 1948, Chapter 52, as defined by section 127(1)(*e*), or, alternatively, whether it was income from an office or employment within the meaning of section 5. Section 3 provides:

> 3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all
>
> (*a*) businesses,
>
> (*b*) property, and
>
> (*c*) offices and employments.

Section 127 (1)(*e*) defines "business" as follows:

> 127. (1) In this Act,
>
> (*e*) "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment;

And section 5 provides in part:

> 5. Income for a taxation year from an office or employment is the salary, wages and other remuneration, including gratuities, received by the taxpayer in the year plus
>
> (*a*) the value of ..... benefits (.....) received or enjoyed by him in the year in respect of, in the course of or by virtue of the office or the employment,.....

The case is of considerable importance by reason of the fact that it is the first one in which the meaning of the term "adventure or concern in the nature of trade" falls to be considered by this Court.

[1] (1953) 9 Tax A.B.C. 358.

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While the bare facts are not in dispute it is desirable to set out the circumstances under which the respondent purchased and sold the lead in question and to review as precisely as possible the considerations that prompted the transaction so that its true nature may be determined.

I shall first summarize the evidence bearing on the circumstances under which the respondent entered into the transaction and its immediate result. The respondent is the president and general manager of The Canada Metal Company Limited, hereinafter called the Company. He has been associated with it for over 43 years and has been its general manager for 18. The Company has its head office at Toronto but has branches or subsidiaries in other Canadian cities including Montreal. Its business is the fabrication of various products of non-ferrous metals including lead. It is not in the business of buying and selling such metals, its income coming from the sale of its fabricated products, but it does on occasion let customers, such as plumbers, have small quantities of lead as a matter of accommodation to them.

The Company is a wholly owned subsidiary of the National Lead Company of New York, hereinafter called the parent Company, a New Jersey corporation with its head office at New York, and its business policy is strictly controlled by the parent Company. For example, it was restricted in its purchases of raw metals to a 30-day supply always on hand with the understanding that as they were used in the fabrication of its products equivalent amounts should be purchased to replace them. In this case we are concerned only with lead. The Company purchased all its lead requirements from Consolidated Mining and Smelting Company Limited, hereinafter called the Canadian supplier, the only producer of lead in Canada. During the war years the Company had been under a quota of between 1400 and 1500 tons of lead per month, fixed by the Metals Control Board at Ottawa, but after its controls were relaxed the Canadian supplier continued to set a quota for the Company and other Canadian concerns similar to it. It would have been possible to buy lead from foreign producers but this would have involved the payment of duty and immediate delivery could not be obtained. The Company lost considerable export business through not being able to obtain the necessary lead from the Canadian supplier. Before it could accept an order involving export of its prod-

ucts it had to ascertain from the Canadian supplier whether the necessary lead would be supplied to it. Evidence was given of a specific difficulty which the Company had experienced in connection with an export order which it had accepted on the assurance that it would get the necessary lead from the Canadian supplier and a loss which it had sustained through the failure of the Canadian supplier to deliver it. Further reference to this difficulty and its effect on the respondent will be made later.

There is another set of facts to which reference should be made. The duty on imported lead varied from $\frac{3}{4}$ cent per pound from Commonwealth countries to 1 cent from foreign ones but if lead was imported and the importer exported the product fabricated from it he was entitled to a 99 per cent drawback of the duty paid. The price which the Company had to pay for lead was fixed by the Canadian supplier and was based on the London market, and later the New York one, with the result that it could not compete in the American market unless it got a benefit equal to the drawback to which it would have been entitled if it had imported the lead, and the Canadian supplier did not give the Company any such benefit in the price charged to it.

In 1949 there were important developments. Lead prices, which had risen to as high as $20\frac{3}{4}$ cents per pound from a previous low of 5 cents, broke sharply to as low as $11\frac{1}{4}$ cents. Lead from foreign countries was available for the first time at these prices. Coupled with these facts was the fact that the Company was still held to a short supply by the Canadian supplier and no allowance was made to it for a benefit by way of a reduction in price equal to the drawback to which it would have been entitled if it had imported foreign lead for the purpose of its export trade.

Under these circumstances, the respondent went to New York in the latter part of May, 1949, and consulted Mr. W. P. Carrol, the vice-president of the parent Company. He requested permission to the Company to import foreign lead. This meant buying it for future delivery in about three months. It was contrary to the policy which the parent Company had set for the Company to allow it to deal in futures and permission to the Company to import the lead for future delivery was refused. The respondent then asked Mr. Carrol whether it would be in order if he

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purchased the lead himself and was told to go ahead. The risk of importing lead for future delivery was contrary to the business policy set for the Company but if the respondent wished to assume the risk himself it was "all right". The respondent felt that he could get the foreign lead and could not get adequate supplies in Canada and had the idea that the Company needed the lead and decided to buy it himself, sell it to the Company and assume personally whatever risk was involved in the transaction. Mr. Carrol then introduced him to Phillip Brothers, a firm of brokers in New York, and he arranged with them to buy 1500 tons of virgin lead at 11½ cents per pound. He had no means for handling such a transaction himself and arranged with Phillip Brothers that the purchase should be made for him by International Iron and Metal Company of Hamilton, which he used as his broker. These arrangements were made in June some time before June 20, 1949. When he had made the arrangements for the purchase of the foreign lead he made the arrangements with the Company's purchasing department for its sale to the Company on its arrival at the market price of lead on the date of its arrival. The sale to the Company was also through International Iron and Metal Company. Phillip Brothers bought the lead from Jugoslavia and on August 17, 1949, Theodore B. Smith Co. Inc., a firm of customs brokers in New York, sent International Iron and Metal Company two invoices for the lead, one for 500 tons to go to the Company at Montreal and one for 1000 tons to go to it at Toronto, the two invoices amounting to a total of $350,238.86, with the information that the lead was expected to arrive in New York on August 23, 1949, per *S.S. Corica*. On August 24, 1949, the Company paid International Iron and Metal Company the sum of $350,000 and on September 22, 1949, the further sum of $11,330.53. The respondent did not himself put up any money for the purchase of the lead.

The lead was sold to the Company for 15⅛ cents per pound, which meant 14⅞ to the respondent after the payment of a commission of $5 per ton to International Iron and Metal Company, and the respondent made a profit on the transaction of $83,712.24. In assessing the respondent for 1949 the Minister added this amount to the amount of taxable income reported by him in his return. The respondent received all this profit in 1949 except the sum of

$13,613.44 which he did not receive until June 23, 1950. Consequently, if the respondent is assessable for the profit made on the transaction the amount which should be added to the amount of taxable income reported by him is $70,098.80 instead of $83,712.24.

In addition to this profit the Company reaped a benefit of approximately $30,000 by way of drawback of duty on the export of the products fabricated from the foreign lead purchased by it and the respondent received a benefit from this indirectly in that his remuneration from the Company was by way of salary and a percentage of profits.

This outline of the circumstances under which the respondent purchased and sold the lead is based largely on his evidence on his examination in chief but it does not tell the whole story. The considerations that led him to the transaction were fully brought out in the competent cross-examination to which he was subjected by Mr. Eaton of counsel for the appellant. It is essential to a proper determination of the true nature of the transaction that these considerations should be reviewed as precisely as possible.

It is clear that the respondent purchased the lead with the intention of selling it to the Company. He did not intend to do anything else with it. Certainly, he did not intend to sell it to anyone else. Indeed, he said specifically on his cross-examination that he purchased it for the Company. He did not, of course, mean that he did so as an agent of the Company. What he meant was that he had the Company's business in mind and purchased it for its benefit. His purpose, as he put it, was to alleviate the short supply of lead to which it had been held by the Canadian supplier and so enable it to fulfil the business that was available to it. It was also part of his purpose to enable it to get the benefit of the drawback of duty to which it would be entitled on the export of the products fabricated from the imported lead and so enable it to compete in the export field.

It is also clear that he saw the opportunity of accomplishing these purposes when lead prices broke in 1949 and it became possible for the first time to import lead from foreign countries at the same price as that charged to the Company by the Canadian supplier.

And there is no doubt that he was spurred to the transaction by his special experience with the Canadian supplier.

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I outline the facts of this experience according to his version of them. In about 1947 the Company had an order for lead products from abroad which required 2,000 tons of lead for their fabrication. The Company could not accept this order without first arranging for the supply of the necessary lead from the Canadian supplier. The respondent then arranged orally with an officer of the Canadian supplier for its supply at a premium of $40 per ton over the price normally charged to the Company. The customer for the products was willing to pay this premium and the order for them was accepted. Then, for reasons that were not fully explained, the Canadian supplier delivered only 500 tons out of the 2000 tons promised and declined to deliver the balance which, as the respondent put it, left the Company 1500 tons short. On his examination for discovery, confirmed on his cross-examination, he admitted that it was this shortage that prompted his transaction. There is no doubt that it still bothered him and that it was an impelling factor. While the respondent had caused litigation to be instituted against the Canadian supplier and it was settled out of court, the Company had suffered a loss on the transaction and the experience rankled in his mind. He said that he did not do himself any good in having the Company make a deal with the Canadian supplier on which it had reneged because the arrangements which he had made orally had not been confirmed and he had been criticized for not having had them reduced to writing. And he said that he tried to make up for his mistake in relying upon a verbal arrangement by buying the foreign lead and supplying the Company with it. There is support for this statement in the fact that his purchase and sale of lead was in the amount of 1,500 tons, the exact amount by which the Canadian supplier had fallen short of the promise to deliver made orally by one its officers.

It is also clear that, apart from this experience, the respondent was resentful against the Canadian supplier for two other reasons. One was that it exported lead abroad and kept the Company and other concerns like it in short supply, and the other, a related one, that it based its prices for lead on foreign prices including duty without giving the Company and others the benefit of a reduction in price equal to the drawback to which it and they would have been entitled if they had imported foreign lead for their export

business, thus preventing them from being able to compete in foreign markets.

When he went to New York to see Mr. Carrol it was for the purpose of discussing with him the Canadian supplier situation and trying to find a solution of the Company's difficulty with it. He pointed out that the difficulty could be overcome by importing foreign lead in view of the fact that lead prices had broken and it was now possible for the first time to purchase foreign lead at a price equal to that charged by the Canadian supplier. It was only when permission to the Company to import the lead was refused because of the parent Company's fixed policy that it should not deal in futures that he decided to import the lead himself and sell it to the Company at the market price prevailing on its arrival.

There were several considerations that impelled him to this decision. On his direct examination he stated in reply to his counsel's question of why he entered into the transaction that he had done so solely to relieve a shortage of the Company in trying to obtain lead supplies. But this is not a fully correct statement. In the break in lead prices that had occurred he saw, not only an immediate advantage to the Company, but also great possibilities for its future business. It was the first opportunity that anyone in Canada had to bring in foreign lead to alleviate the shortage from which everybody in the lead business was suffering but they did not see fit to gamble on that because they felt that the market would go lower but he felt that if he could obtain business for the Company he would be willing to take a chance in the situation that existed for the first time since 1939 that it was possible to import foreign lead.

Thus, while he emphasized on his direct examination that his purpose was to alleviate the shortage in lead supply from which the Company had suffered he had a further and larger purpose. He felt that he had to do something to overcome the Company's difficulty with the Canadian supplier that would help it in the future. As he put it, he figured that probably the shock of somebody importing foreign lead would bring the Canadian supplier to its senses and a better realization of the need of fair treatment to the Company. The alleviation of the Company's immediate shortage was only part of his plan. He was looking to the

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future success of the Company not only for its sake but also for the resultant benefit to himself.

What was running through his mind is indicated by a characteristic statement on his cross-examination:

> I felt that I would wind up things—what I was looking to, I mean, is the success of the company—how long are we going to continue on having to be dictated to by a producer in this country who had plenty of supplies that they would sell outside of Canada and not supply to the people in the country—that is the basis of the whole thing, I mean probably it is not exactly as I put it but from the point of view of the future of this business, it is not today or tomorrow—it is in a few years to come—and the growth of this country here after years of building up and one thing and another. The benefit that would be derived by me probably personally—by putting up a fight with Consolidated Mining and Smelting and showing that I did not have to depend on them entirely, would bring about something—just as has happened.

What he meant by the last part of this statement is that the shortage in lead supply to which the Canadian supplier had held the Company has since been eased and the Canadian supplier in its price to the Company now gives it a benefit equal to the drawback of duty to which it would be entitled if it imported the lead for its exported fabricated products. Thus, the respondent's venture has "paid off" not only for the Company but for the respondent as well.

It was argued that the respondent did not enter into the transaction with the intention of making a profit for himself on the sale of the lead to the Company. But, even if that be conceded, it is manifest that he had a profit making intention, if not immediately, then certainly for the future, both for the Company and for himself.

While he said that he could not tell whether he would make a profit or a loss on the transaction it is a fair inference from the evidence as a whole that he did not consider that the risk of loss was substantial. While he stated on his examination in chief that he did not keep track of lead prices from day to day the break in lead prices in 1949 made a great impression on him. In a letter to the Department of National Revenue, dated November 5, 1951, he stated that the decline in lead prices within three months had been from $20\frac{3}{4}$ cents per pound to $11\frac{3}{4}$ cents and that never during his experience in the business had any price decline been so severe. That he did not, under these circumstances, consider the risk of loss substantial is shown by his admission on his cross-examination that he thought that

after such a break as had occurred the market usually steadied down.

But even if the risk of loss had been great the respondent would have taken it. In his mind, the business advantages that would accrue to the Company from the achievement of his objectives and the benefit of such success to himself, since his remuneration was based on salary plus a percentage of profit, far outweighed any risk of loss to himself from the transaction. On his cross-examination he stated that even if the transaction had cost him $60,000 it would have been worth it to him. Indeed, it has worked out well in his returns from the Company in its recognition of his 40 years of work for it in an increase of salary with its resultant benefit in pension rights on his retirement.

That the respondent was well pleased with the result of his venture is shown by his statement, on his cross-examination, that if a similar situation arose again and he could not get approval of action on the part of the Company he would repeat his transaction.

As already stated, the prime issue in this appeal is whether the respondent's purchase and sale of 1500 tons of lead was an adventure or concern in the nature of trade. If it was, his profit from it was taxable income from a business within the meaning of section 3 of *The Income Tax Act* of 1948, as defined by section 127(1)(*e*). The expression "adventure or concern in the nature of trade" appeared for the first time in a Canadian income tax act in section 127(1)(*e*) of the 1948 Act. It was, no doubt, taken from the *Income Tax Act, 1918* of the United Kingdom. In that Act under Case I of Schedule D tax was chargeable in respect of any trade . . . and section 237 defined trade as including "every trade, manufacture, adventure or concern in the nature of trade". Prior to its inclusion in the definition of trade by section 237 of the *Income Tax Act, 1918,* the expression appeared in the *Income Tax Act* of 1842. In that Act provision was made in the First Case under Schedule (d) for the charging of duties in respect of any "Trade, Manufacture, Adventure, or Concern in the nature of Trade, ..." Indeed, the expression goes back to the Act of 1803.

It is, I think, plain from the wording of the Canadian Act, quite apart from any judicial decisions, that the terms "trade" and "adventure or concern in the nature of trade" are not synonymous expressions and it follows that the

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profit from a transaction may be income from a business within the meaning of section 3 of the Act, by reason of the definition of business in section 127(1)(*e*), even although the transaction did not constitute a trade, provided that it was an adventure or concern in the nature of trade.

In view of the dearth of Canadian decisions on what constitutes an adventure or concern in the nature of trade resort may be had to Scottish and English decisions on the corresponding United Kingdom enactment, but in applying them it is important to keep in mind that in the United Kingdom the jurisdiction of the courts in appeals against the findings of the Commissioners is limited to questions of law.

Strangely enough, the meaning of the expression "adventure in the nature of trade", although it had been in the United Kingdom Act from as early as 1803, was not discussed in any case to which my attention has been directed prior to the decision of the Scottish Court of Session in *The Commissioners of Inland Revenue v. Livingston et al*[1], to which I shall refer later, although there is a reference to it in *Californian Copper Syndicate Limited v. Harris*[2] in the finding of the Commissioners that the property in question in the case purchased by the Company was acquired with the object of being resold, and that by the purchase and resales of their property the Company carried on an adventure or concern in the nature of trade in the meaning of the First Case of Schedule D of the *Income Tax Act 1842*.

The first definition of "trade" in the United Kingdom cases is that of Lord Davey in *Grainger and Son v. Gough*[3]. There he said, in his speech in the House of Lords:

> Trade in its largest sense is the business of selling, with a view to profit, goods which the trader has either manufactured or himself purchased.

This definition is only partially helpful. It indicates that "trade" is included in "business" which latter term is of wider import than that of trade in that it embraces any gainful activity, but it does not define the term "trader".

An advance was made by the Lord Justice Clerk (Macdonald) of the Court of Exchequer (Scotland) in the

[1] (1926) 11 T.C. 538. [2] (1904) 5 T.C. 159 at 165.
[3] (1896) 3 T.C. 462 at 474.

famous case of *Californian Copper Syndicate Limited v. Harris*[1]. In that case the Company had been formed for the purpose, *inter alia*, of acquiring and reselling mining property and had acquired and worked several mining properties in California and then sold them to a second Company receiving payment in fully paid up shares of the latter Company. The Company was assessed in respect of the profit made on the transaction and appealed against the assessment so made but the Commissioners held, as I have already indicated, that the Company had carried on an adventure or concern in the nature of trade in the meaning of the First Case of Schedule D of the *Income Tax Act* of 1842 and that the profits arising from the transaction whether received in cash or shares of another company were assessable to income tax. The Court of Session as the Court of Exchequer in Scotland agreed that the determination of the Commissioners was right. Its decision is of particular importance because of the objective test which the Lord Justice Clerk laid down for determining whether the gain from a transaction was a capital one or income subject to tax. At page 165, he said:

> It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and therefore seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realisation, the gain they make is liable to be assessed for Income Tax.

And then there follows the famous statement of the test to be applied:

> What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts; the question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

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

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The Lord Justice Clerk then proceeded to a review of the evidence and said, at page 166:

> I feel compelled to hold that this Company was in its inception a Company endeavouring to make a profit by a trade or business, and that the profitable sale of its property was not truly a substitution of one form of investment for another. It is manifest that it never did intend to work this mineral field with the capital at its disposal. Such a thing was quite impossible. Its purpose was to exploit the field, and obtain gain by inducing others to take it up on such terms as would bring substantial gain to themselves. This was that the turning of investment to account was not to be merely incidental but was, as the Lord President put it in the case of the Scottish Investment Company, the essential feature of the business, speculation being among the appointed means of the Company's gains.

And concluded that in these circumstances the finding of the Commissioners was right. Lord Young and Lord Trayner agreed.

The test laid down by the Lord Justice Clerk in the *Californian Copper Syndicate* case (*supra*) has been approved in a great many cases: *vide*, for example, by Lord Dunedin, speaking for the Judicial Committee of the Privy Council, in *Commissioner of Taxes v. Melbourne Trust, Limited*[1]; by Lord Buckmaster in the House of Lords in *Ducker v. Rees Roturbo Development Syndicate, Limited* and *Commissioners of Inland Revenue v. Rees Roturbo Development Syndicate Limited*[2]; by Duff J., as he then was, speaking for the Supreme Court of Canada, in *Anderson Logging Co. v. The King*[3], which was confirmed by the Judicial Committee of the Privy Council[4], and, more recently, by this Court and the Supreme Court of Canada, per Kerwin J., as he then was, in *Atlantic Sugar Refineries Limited v. Minister of National Revenue*[5].

The decision is subject to certain comments. In the first place, I think it is clear that when the Lord Justice Clerk used the expression "scheme of profit-making" he did not imply that the word "scheme" meant a multiplicity of transactions. There could be a scheme of profit making even if there were only one transaction. The difficulty involved in the term "scheme of profit making" came before the Court inferentially, if not directly, in *T. Beynon and Co., Limited v. Ogg*[6]. There a company carrying on business as coal merchants, ship and insurance brokers and as sole selling

[1] [1914] A.C. 1001 at 1010.
[2] [1928] A.C. 132 at 140.
[3] [1925] S.C.R. 45 at 48.
[4] [1926] A.C. 140.
[5] [1949] Ex. C.R. 622; [1949] S.C.R. 706.
[6] (1918) 7 T.C. 125.

agents for various colliery companies, in which latter capacity it purchased waggons for its clients, made a purchase of waggons on its own account as a speculation and subsequently sold them at a profit. It contended that since the transaction was an isolated one the profit was in the nature of a capital profit on the sale of an investment and should be excluded in computing its liability to income tax. It was held, however, that it was made in the operation of the Company's business and properly included in the computation of its profits therefrom. Sankey J. put the matter thus, at page 132:

> The only question one has to determine is which side the line this transaction falls on. Is it . . . in the nature of capital profit on the sale of an investment? Or is it . . . a profit made in the operation of the Appellant Company's business?

As I see it, the test thus put is to the same effect and essentially the same as that laid down by the Lord Justice Clerk in the *Californian Copper Syndicate* case (*supra*). Certainly, it was so regarded by Duff J., as he then was, in the *Anderson Logging Co.* case (*supra*).

The case is also of importance for the stress which the Lord Justice Clerk put on the element of speculation as a determining factor in the decision that the transaction was not the realisation of an investment and its transfer into another form but the gaining of profit by the sale of the property and thus a transaction that was characteristic of what a trader would do. This stress on the speculative element is of particular importance when it is coupled with the finding that the sale of a property, which by itself is productive of income and might be regarded as an investment, can be a trade in the property rather than a realisation of an investment.

Finally, I must confess that I find it strange that although the Commissioners had denied the Company's appeal against its assessment on the ground that the profits made by it were from a transaction of purchase and sale that was an adventure or concern in the nature of trade and the court was unanimous in the opinion that they were right in their finding, there is not a word in the judgments bearing on what is an adventure or concern in the nature of trade as distinct from what is a trade. But it is obvious, it seems to me, that if the Court considered the transaction in question a trading transaction, as it clearly did, it must,

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a fortiori, be considered as an adventure or concern in the nature of trade, as the Commissioners had found it to be.

I now come to the decision in *The Commissioners of Inland Revenue v. Livingston et al*[1] in which an attempt was made to define the expression "adventure in the nature of trade". There the facts were that three persons, a ship repairer, a blacksmith and a fish salesmen's employee purchased as a joint venture a cargo vessel with a view to converting it into a steam-drifter and selling it. They were not connected in business and had never previously bought a ship. Extensive repairs and alterations to the ship were carried out by the orders of the purchasers of the ship, two of them being employed on it in their ordinary capacity and at the ordinary trade rates, and on December 31, 1924, the owners sold the vessel at a profit. They were assessed to income tax on the profit so made and appealed to the Commissioners who allowed the appeal on the ground that the profit realised in the transaction in question was not made in the operation of business ordinarily carried on by the purchasers. Thereupon the Crown appealed to the Court of Session as the Court of Exchequer in Scotland and it unanimously reversed the decision of the Commissioners and held the owners of the ship assessable to income tax on the profit made by them.

While all the judges agreed that the finding of the Commissioners should be reversed the case loses much of the value that it might otherwise have by reason of the divergence in the four reasons for judgment. In my opinion, the Lord President (Clyde) made the most useful contribution to the jurisprudence. At page 542, he said:

> I think the profits of an isolated venture, such as that in which the Respondents engaged, may be taxable under Schedule D provided the venture is "in the nature of trade". I say, "may be", because in my view regard must be had to the character and circumstances of the particular venture. If the venture was one consisting simply in an isolated purchase of some article against an expected rise in price and a subsequent sale of it it might be impossible to say that the venture was "in the nature of trade"; because the only trade in the nature of which it could participate would be the trade of a dealer in such articles, and a single transaction falls as far short of constituting a dealer's trade, as the appearance of a single swallow does of making a summer. The trade of a dealer necessarily consists of a course of dealing, either actually engaged in or at any rate contemplated and intended to continue. But this principle is difficult to apply to ventures of a more complex character such as that with which the present case is concerned.

[1] (1926) 11 T.C. 538.

And then Lord Clyde put the test of whether a venture was in the nature of trade as follows:

> I think the test, which must be used to determine whether a venture such as we are now considering is, or is not, "in the nature of trade", is whether the operations involved in it are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made. If they are, I do not see why the venture should not be regarded as "in the nature of trade", merely because it was a single venture which took only three months to complete.

And he went on to say that the operations were the same as those which characterised the trade of converting and refitting second-hand articles for sale and that the transaction was "in the nature of trade". Lord Sands took a different view. In his view it was the operation done on the ship that made the transaction a trading one. At page 543 he said:

> But I am disposed to think that it would introduce the element of carrying on a trade if the purchaser were, by himself or his own employees or by a contractor, to carry through a manufacturing process which changed the character of the article.

In Lord Blackburn's opinion the case turned on the fact that two of the three purchasers worked on the ship themselves and were thus exercising their own trades.

A great step towards clarification of the meaning of the expression under review was taken by the Court of Session in *Rutledge v. The Commissioners of Inland Revenue*.[1] There the appellant, who was a money lender and also interested in a cinema company and other businesses, being in Berlin on business connected with the cinema company, purchased very cheaply a large quantity of toilet paper from a bankrupt German firm and within a short time after his return to London sold the whole consignment to one person at a considerable profit. On being assessed on this profit he appealed to the Commissioners who found that the profit made was liable to assessment as being profit in the nature of trade and the Court unanimously dismissed the appeal from their finding. The judgment of the Lord President (Clyde) is illuminating. After stating that the question in the case was whether the profits were or were not profits of an "adventure . . . . in the nature of trade"

[1] (1929) 14 T.C. 490.

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within the meaning of section 237 of the *Income Tax Act, 1918* and expressing the opinion that the transaction was certainly an adventure went on to say, at page 496:

> The question remains whether the adventure was one "in the nature of trade". The appellant's contention is that it could not be such, because it is essential to the idea of trade that there should be a continuous series of trading operations; and an observation made in the course of my opinion in *Inland Revenue v. Livingston,* 1927 S.C. 251, at p. 255, was founded on, according to which "a single transaction falls as far short of constituting a dealer's trade, as the appearance of a single swallow does of making a summer. The trade of a dealer necessarily consists of a course of dealing, either actually engaged in or at any rate contemplated and intended to continue." But the question here is not whether the appellant's isolated speculation in toilet paper was a trade, but whether it was an "adventure . . . . in the nature of trade"; and in the opinion referred to I said that, in my opinion, "the profits of an isolated venture . . . . may be taxable under Schedule D provided the venture is 'in the nature of trade' ". I see no reason to alter that opinion. It is no doubt true that the question whether a particular adventure is "in the nature of trade" or not must depend on its character and circumstances, but if—as in the present case—the purchase is made for no other purpose except that of re-sale at a profit, there seems little difficulty in arriving at the conclusion that the deal was "in the nature of trade", though it may be wholly insufficient to constitute by itself a trade.

Then the Lord President put his conclusion clearly, at page 497:

> it seems to me to be quite plain (1) that the Appellant, in buying the large stock of toilet paper, entered upon a commercial adventure or speculation; (2) that this adventure or speculation was carried through in exactly the same way as any regular trader or dealor would carry through any of the adventures or speculations in which it is his regular business to engage; and therefore (3) that the purchase and re-sale of the toilet paper was an "adventure . . . . in the nature of trade" within the meaning of the Income Tax Act, 1918.

Lord Sands agreed but put his opinion somewhat differently, stressing the nature and size of the subject matter. At page 497, he said:

> The nature and quantity of the subject dealt with exclude the suggestion that it could have been disposed of otherwise than as a trade transaction. Neither the purchaser nor any purchaser from him was likely to require such a quantity for his private use. Accordingly, it appears to me quite a reasonable view for the Commissioners to have taken that this transaction was in the nature of trade. From beginning to end the intention was simply to buy and to re-sell . . . . I do not think that we can regard what was done here as other than an "adventure . . . in the nature of trade" within the meaning of the Act.

Lord Blackburn and Lord Morison concurred.

And in *The Balgownie Land Trust, Ltd. v. The Commissioners of Inland Revenue*[1] Lord President Clyde, speaking of the definition of trade in section 237 of the *Income Tax Act, 1918,* said:

> that definition makes it plain that even the profit of an isolated transaction—if it constitutes an adventure in the nature of trade—may be brought within Case I of Schedule D of the Income Tax Act . . . . A single plunge may be enough provided it is shown to the satisfaction of the Court that the plunge is made in the waters of trade; . . . . .

The next case in order of time was *Leeming v. Jones*[2] but I shall defer comment on it until later.

The *Rutledge* case *(supra)* was followed in *Lindsay et al v. The Commissioners of Inland Revenue*[3] and later in *The Commissioners of Inland Revenue v. Fraser*[4]. There the respondent, a woodcutter, bought through an agent for resale a large quantity of whisky which he sold at a large profit. The purchases and sales were made in three lots. This was his only dealing in whisky. He had no special knowledge of the whisky trade and did not take delivery of the whisky or have it blended or advertised. The purchase and the sales were made through an agent. On being assessed in respect of the profit on the transaction he appealed to the Commissioners who found that an adventure in the nature of trade had not been carried on, that merely an investment had been made and realised and that it was not assessable to income tax. Their finding was unanimously reversed by the Court of Session. The Judgment of the Lord President (Normand) is clear cut. In the first place, he clearly realised the distinction between a trade and an adventure in the nature of trade. At page 502, he said:

> We must remind ourselves that we are not to decide whether the Respondent was carrying on a trade, but whether the transaction was an adventure in the nature of trade . . . . It would be extremely difficult to hold that a single transaction amounted to a trade but it may be much less difficult to hold that a single transaction is an adventure in the nature of trade.

Lord Normand then went on to discuss what criterion the Court should apply in determining whether a transaction

[1] (1929) 14 T.C. 684 at 691.
[2] [1930] 1 K.B. 299; [1930] A.C. 415.
[3] (1932) 18 T.C. 43.
[4] (1942) 24 T.C. 498.

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was an adventure in the nature of trade and whether the transaction under review was an adventure in the nature of trade. I quote his opinion, at page 502:

> There was much discussion as to the criterion which the Court should apply. I doubt if it would be possible to formulate a single criterion. I said in a case which we decided only yesterday that one important factor may be the person who enters into the transaction . . . It is in general more easy to hold that a single transaction entered into by an individual in the line of his own trade (although not part and parcel of his ordinary business) is an adventure in the nature of trade than to hold that a transaction entered into by an individual outside the line of his own trade or occupation is an adventure in the nature of trade. But what is a good deal more important is the nature of the transaction with reference to the commodity dealt in. The individual who enters into a purchase of an article or commodity may have in view the resale of it at a profit, and yet it may be that that is not the only purpose for which he purchased the article or the commodity, nor the only purpose to which he might turn it if favourable opportunity of sale does not occur. In some cases the purchase of a picture has been given as an illustration. An amateur may purchase a picture with a view to its resale at a profit, and yet he may recognise at the time or afterwards that the possession of the picture will give him aesthetic enjoyment if he is unable ultimately, or at his chosen time, to realise it at a profit. A man may purchase stocks and shares with a view to selling them at an early date at a profit, but, if he does so, he is purchasing something which is itself an investment, a potential source of revenue to him while he holds it. A man may purchase land with a view to realising it at a profit, but it also may yield him an income while he continues to hold it. If he continues to hold it, there may be also a certain pride of possession. But the purchaser of a large quantity of a commodity like whisky, greatly in excess of what could be used by himself, his family and friends, a commodity which yields no pride of possession, which cannot be turned to account except by a process of realisation, I can scarcely consider to be other than an adventurer in a transaction in the nature of a trade; and I can find no single fact among those stated by the Commissioners which in any way traverses that view. In my opinion the fact that the transaction was not in the way of the business (whatever it was) of the Respondent in no way alters the character which almost necessarily belongs to a transaction like this. Most important of all, the actual dealings of the Respondent with the whisky were exactly of the kind that take place in ordinary trade.

I stress Lord Normand's opinion in the last sentence of his cited remarks. Lord Normand then cited with approval the statement of the Lord Justice Clerk in the *Californian Copper Syndicate case* (*supra*) and made the significant remark, at page 503:

> Now, if that is true of lands it is *a fortiori* true of the purchase and sale of a commodity like whisky in bond which, in the hands of a purchaser, has no meaning except as an incursion into the sphere of trading for profit.

And Lord Normand was unable to distinguish the case from the *Rutledge* case (*supra*).

Lord Moncrieff, in his reasons for judgment, went even further. At page 505, he said:

> When a man deals with a trading commodity such as whisky in bulk in bond, which he has acquired merely for the purpose of resale and proceeds to sell, and there are no further material circumstances in the case, he engages in my view in trade, and in trade only, and not in the investment of capital funds.

I next refer to certain expressions of opinion in *Commissioners of Inland Revenue v. Reinhold*[1]. There Lord Carmont said, at page 392:

> Certain transactions shew inherently that they are not investments but incursions into the realm of trade or adventures of that nature. In my opinion, it is because of the character of such transactions that it can be said with additional definiteness that certain profits are income from trade and not capital accretion of an investment, the purchase and sale of, for instance, whisky, as in *Fraser's* case, 1942 S.C. 493, was a trading venture and so too in regard to toilet paper: *Rutledge*, 1929 S.C. 379. This means that, although in certain cases it is important to know whether a venture is isolated or not, that information is superfluous in many cases where the commodity itself stamps the transaction as a trading venture, and the profits and gains are plainly income liable to tax.

Finally, there is the important decision of the House of Lords in *Edwards v. Bairstow*[2]. In that case it was sought to charge the respondents with income tax on the profit arising from the purchase and sale of certain spinning plant acquired and sold during the period 1946-1948, but the Commissioners discharged the assessments on the determination that the transaction from which the profit arose was not an adventure in the nature of trade. Wynn Parry J. and the Court of Appeal upheld the finding of the Commissioners on the ground that the determination was purely a question of fact and that it was not open to the court to interfere with it. But the House of Lords unanimously reversed the decision and held that the transaction was an adventure in the nature of trade.

I need not consider the discussion whether the determination of the Commissioners was a question of fact or a question of law or a question of mixed law and fact. That question is of the utmost importance under the United Kingdom system but in Canada there is no similar limitation of jurisdiction and our Court is not concerned with it.

[1] (1953) 34 T.C. 389.

[2] [1955] 3 All E.R. 48.

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Lord Radcliffe said, at page 58:

> The profit from the set of operations that comprised the purchase and sales of the spinning plant was the profit of an adventure in the nature of trade. What other word is apt to describe the operations? Here are two gentlemen who put their money or the money of one of them into buying a lot of machines. They have no intention of using it as machinery, so they do not buy it to hold as an income-producing asset. They do not buy it to consume or for the pleasure of enjoyment. On the contrary, they have no intention of holding their purchase at all. They are planning to sell the machinery even before they have bought it. And, in due course, they do sell it, in five separate lots, as events turned out. And, as they hoped and expected, they make a net profit on the deal, after charging all expenses such as repairs and replacements, commissions, wages, travelling and entertainment and incidentals, which do, in fact, represent the cost of organizing the venture and carrying it through.
>
> This seems to me, inescapably, a commercial deal in second-hand plant.

Later, he said, at page 58:

> There remains the fact which was avowedly the original ground of the commissioners' decision—"this was an isolated case". But, as we know, that circumstance does not prevent a transaction which bears the badge of trade from being in truth an adventure in the nature of trade. The true question in such cases is whether the operations constitute an adventure of that kind, not whether they by themselves, or they in conjunction with other operations, constitute the operator a person who carries on a trade. Dealing is, I think, essentially a trading adventure, and the respondents' operations were nothing but a deal or deals in plant and machinery.

The cases establish that the inclusion of the term "adventure or concern in the nature of trade" in the definition of "trade" in the United Kingdom Act substantially enlarged the ambit of the kind of transactions the profits from which were subject to income tax. In my opinion, the inclusion of the term in the definition of "business" in the Canadian Act, quite apart from any judicial decisions, has had a similar effect in Canada. I am also of the view that it is not possible to determine the limits of the ambit of the term or lay down any single criterion for deciding whether a particular transaction was an adventure of trade for the answer in each case must depend on the facts and surrounding circumstances of the case. But while that is so it is possible to state with certainty some propositions of a negative nature.

The first of these is that the singleness or isolation of a transaction cannot be a test of whether it was an adventure in the nature of trade. In *Atlantic Sugar Refineries Limited v. Minister of National Revenue*[1] I expressed the opinion

[1] [1948] Ex. C.R. 622 at 631.

that the fact that a transaction was an isolated one did not exclude it from the category of trading or business transactions of such a nature as to attract tax to the profit therefrom and cited several decisions in support of my statement. The decision in that case was affirmed by the Supreme Court of Canada[1] and has been followed in other cases: *vide*, for example, *Honeyman v. Minister of National Revenue*[2]. This does not mean that the isolation or singleness of a transaction has no bearing on whether it was a business or trading transaction. On the contrary, it might be a very important factor.

But "trade" is not the same thing as "an adventure in the nature of trade" and a transaction might well be the latter without being the former or constituting its maker a "trader". And whatever merit the singleness or isolation of a transaction may have in determining whether it was a trading or business transaction it has no place at all in determining whether it was an adventure in the nature of trade. The very word "adventure" implies a single or isolated transaction and it is erroneous to set up its singleness or isolation as an indication that it was not an adventure in the nature of trade. Lord Simonds put the matter explicitly in *Edwards v. Bairstow* (*supra*) when he said, at page 54:

> The determination that a transaction was not an adventure in the nature of trade because it was an isolated transaction was clearly wrong in law.

In my opinion, it may now be taken as established that the fact that a person has entered into only one transaction of the kind under consideration has no bearing on the question whether it was an adventure in the nature of trade. It is the nature of the transaction, not its singleness or isolation, that is to be determined.

Nor is it essential to a transaction being an adventure in the nature of trade that an organization be set up to carry it into effect. The contention that this is necessary arose from the finding of the Commission in *Martin & Lowry*[3] which the House of Lords did not disturb, but it is plain from the decisions in such cases as *Rutledge v. The Commissioner of Inland Revenue* (*supra*) *and Lindsay et al v.*

[1] [1949] S.C.R. 706. [2] [1955] Ex. C.R. 200 at 208.
[3] [1927] A.C. 312.

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The Commissioners of Inland Revenue (*supra*) that a transaction can be an adventure in the nature of trade even although no organization has been set up to carry it into effect.

And the two last mentioned cases are authority for saying that a transaction may be an adventure in the nature of trade even although nothing was done to the subject matter of the transaction to make it saleable, as in *The Commissioners of Inland Revenue v. Livingston et al* (*supra*).

Likewise, the fact that a transaction is totally different in nature from any of the other activities of the taxpayer and that he has never entered upon a transaction of that kind before or since does not, of itself, take it out of the category of being an adventure in the nature of trade. What has to be determined is the true nature of the transaction and if it is in the nature of trade, the profits from it are subject to tax even if it is wholly unconnected with any of the ordinary activities of the person who entered upon it and he has never entered upon such a transaction before or since.

And a transaction may be an adventure in the nature of trade although the person entering upon it did so without any intention to sell its subject matter at a profit. The intention to sell the purchased property at a profit is not of itself a test of whether the profit is subject to tax for the intention to make a profit may be just as much the purpose of an investment transaction as of a trading one. Such intention may well be an important factor in determining that a transaction was an adventure in the nature of trade but its presence is not an essential prerequisite to such a determination and its absence does not negative the idea of an adventure in the nature of trade. The considerations prompting the transaction may be of such a business nature as to invest it with the character of an adventure in the nature of trade even without any intention of making a profit on the sale of the purchased commodity. And the taxpayer's declaration that he entered upon the transaction without any intention of making a profit on the sale of the purchased property should be scrutinized with care. It is what he did that must be considered and his declaration that he did not intend to make a profit may be overborne by other considerations of a business or trading nature motivating the transaction.

Consequently, the respondent in the present case cannot escape liability merely by showing that his transaction was a single or isolated one, that it was not necessary to set up any organization or perform any operation on its subject matter to carry it into effect, that it was different from and unconnected with his ordinary activities and he had never entered into such a transaction before or since and that he purchased the lead without any intention of making a profit on its sale to the Company.

Nor is there any comfort for the respondent in the decision in *Leeming v. Jones*[1] on which counsel for the respondent strongly relied. The facts in that case were that L. joined with three other persons in obtaining an option to purchase a rubber estate in the Malay Peninsula. It was not large enough for re-sale to a public company to be formed to work it, and a further option to purchase an additional estate was acquired. Ultimately, the two estates were sold to a company at a profit in which L. shared. He was assessed to income tax on the amount of this profit and appealed to the Commissioners who found that he acquired an interest in the property with the sole object of turning it over at a profit and that he did not have any intention of holding it as an investment and they confirmed the assessment. L. appealed from this decision and Rowlatt J. sent the case back to the Commissioners for a finding whether the transaction was an adventure in the nature of trade. They then found that it was not "a concern in the nature of trade". The case then came back to Rowlatt J. who allowed the appeal from the Commissioners' confirmation of the assessment. From this decision the Crown appealed to the Court of Appeal which unanimously dismissed its appeal and a further appeal to the House of Lords was also unanimously dismissed.

I have read the reasons for judgment in the Court of Appeal and in the House of Lords with care and can fairly say that the case did not decide what constitutes or does not constitute an adventure or concern in the nature of trade and did not purport to do so. Both the Court of Appeal and the House of Lords accepted the finding of the Commissioners that the transaction in question was not a concern in the nature of trade. That being so, the only issue before them was whether L's profit, not being a profit

[1] [1930] 1 K.B. 279; [1930] A.C. 415.

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from a concern in the nature of trade and, therefore, not taxable under Case I of Schedule D of the *Income Tax Act, 1918,* could be taxable as a profit under Case VI of Schedule D and they held that it could not. If it was not an adventure or concern in the nature of trade, as found by the Commissioners, the profit from it was not taxable. There was no middle course. As Lawrence L.J. put it in the Court of Appeal, at page 301:

> I have the greatest difficulty in seeing how an isolated transaction of this kind, if it be not an adventure in the nature of trade, can be a transaction ejusdem generis with such an adventure and therefore fall within Case VI. All the elements which would go to make such a transaction an adventure in the nature of trade, in my opinion, would be required to make it a transaction ejusdem generis with such an adventure. It seems to me that in the case of an isolated transaction of purchase and re-sale of property there is really no middle course open. It is either an adventure in the nature of trade, or else it is simply a case of sale and re-sale of property. If in such a transaction as we have here the idea of an adventure in the nature of trade is negatived, I find it difficult to visualize any source of income, or to appreciate how such a transaction can properly be said to have been entered into for the purpose of providing income or revenue.

This is plainly not a statement that an isolated transaction of purchase and re-sale of property is not an adventure in the nature of trade. It was made with an acceptance of the Commissioners' finding that it was not such an adventure and without any attempt to assess the facts of the transaction independently. The idea of an adventure in the nature of trade having thus been negatived by the Commissioners, there was no other source of taxable profit. The case affords a striking illustration of the care that must be taken in applying an English income tax decision to a Canadian case. There the Court was faced with the complication resulting from the fact that it was bound by the finding of fact made by the Commissioners, a complication that does not exist in Canada. If the facts in that case had come before a Canadian Court it would have been open to it to find that they did constitute an adventure in the nature of trade. In view of this feature of the case the decision in *Leeming v. Jones,* whatever its value in the United Kingdom particularly in the light of the decision in *Edwards v. Bairstow* (*supra*), is of little, if any, value in Canada. Certainly, it is of no value to the respondent.

In addition to the negative propositions established by the cases they also lay down positive guides. There is, in the first place, the general rule that the question whether a particular transaction is an adventure in the nature of trade depends on its character and surrounding circumstances and no single criterion can be formulated.

But there are some specific guides. One of these is that if the transaction is of the same kind and carried on in the same way as a transaction of an ordinary trader or dealer in property of the same kind as the subject matter of the transaction it may fairly be called an adventure in the nature of trade. The decisions of the Lord President in the *Livingston* case (*supra*) and the *Rutledge* case (*supra*) support this view. Put more simply, it may be said that if a person deals with the commodity purchased by him in the same way as a dealer in it would ordinarily do such a dealing is a trading adventure: *vide* Lord Radcliffe's reasons for judgment in *Edwards v. Bairstow* (*supra*).

And there is the further established rule that the nature and quantity of the subject matter of the transaction may be such as to exclude the possibility that its sale was the realisation of an investment or otherwise of a capital nature or that it could have been disposed of otherwise than as a trade transaction: *vide* the reasons for judgment of Lord Sands in the *Rutledge* case (*supra*). And there is the statement of Lord Carmont in the *Rheinhold* case (*supra*) that there are cases "where the commodity itself stamps the transaction as a trading venture."

In my opinion, the principles laid down in the *Rutledge* case (*supra*), the *Fraser* case (*supra*) and the *Edwards v. Bairstow* case (*supra*) are applicable to the present case and I have no hesitation in holding that the respondent's purchase and sale of 1500 tons of lead was an adventure in the nature of trade. I do not see how it could possibly have been anything else. His transaction was certainly an adventure, a bold and imaginative one and highly successful, both for the Company and for himself, and the only question is whether it was in the nature of trade. If the alternatives are whether it was of a capital nature or in the nature of trade I am unable to see how there can be any doubt of which it was. The nature and quantity of its subject matter, namely, 1500 tons of lead requiring 22 carloads to carry

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it, excluded any possibility that it was of an investment nature involving the realization of a security or resulted in a fortuitous accretion of capital or was otherwise of a capital nature. It is plain that the respondent had no considerations of a capital nature in mind. The nature and quantity of the subject matter of the transaction were such as to exclude the possibility that it was other than a transaction of a trading nature. The respondent could not do anything with the lead except sell it and he bought it solely for the purpose of selling it to the Company. In my judgment, the words of Lord Carmont in the *Rheinhold* case (*supra*) that "the commodity itself stamps the transaction as a trading transaction" apply with singular force to the respondent's transaction.

Moreover, he dealt with the lead in exactly the same manner as any dealer in imported lead would have done. He bought it from abroad and sold it to a user of lead in Canada, namely, the Company. If it had bought the lead it would have been subject to tax on the profit made by it on the sale of its products fabricated from the lead so bought. The respondent merely did what the Company would have done if his judgment in the matter had prevailed. But since the Company was not permitted by the parent company to deal in the lead the respondent dealt in it himself and did so exactly in the same manner as a trader or dealer in imported lead would have done. This brings his transaction within the decisions of the Lord President in the *Livingston* and *Fraser* cases (*supra*). It was a dealing in lead and, as such, it was, in the words of Lord Radcliffe in *Edwards v. Bairstow* (*supra*), essentially a trading adventure.

It is of no avail to the respondent that when he purchased the lead he did so without any intention of selling it to the Company at a profit. He did not pretend that his purchase was for an investment purpose. All his reasons were business reasons of a trading nature. His adventure was a speculative one. When lead prices broke others in the industry were unwilling to gamble but he did not hesitate. He saw advantages of a business nature in the transaction

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and these outweighed with him the risk of loss which he undertook. He calculated that the advantages outweighed the risk and he deliberately assumed it. He was justified in his speculative venture. The Company got the benefit of a substantial drawback of approximately $30,000. The respondent was rehabilitated with the Company and in his own self esteem. He made up for his remissness in making a bad deal causing a substantial loss to the Company through relying on a verbal agreement with the Canadian supplier. And he succeeded in getting better supply terms from the Canadian supplier. As for himself his venture brought him the personal satisfaction of victory as well as an increase in salary and pension rights. These possible advantages were all contemplated by him. The evidence indicates that he entered into the transaction for a variety of purposes but they were all of a business nature and many of them were similar to those that would have motivated a trader. His transaction was a dealing in lead and nothing else.

I am, therefore, of the opinion that the respondent's transaction was an adventure in the nature of trade within the meaning of section 127(1)(*e*) of *The Income Tax Act* of 1948, and that his profit from it was profit from a business within the meaning of section 3 of the Act and that the Minister was right in including it in the assessment.

In view of this finding it is unnecessary to consider the alternative contention put forward by counsel for the Crown that the respondent's profit came from an office or employment.

The result is that the appeal from the decision of the Income Tax Appeal Board must be allowed and the Minister's assessment restored except, as already stated, that the amount of profit to be assessed should be $70,098.80 instead of $83,712.24. And the appellant is entitled to costs.

Judgment accordingly.