1944
Sept. 5
1947
March 6

BETWEEN:

GEORGE W. ARGUE ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... } RESPONDENT.

Revenue—Income—Excess Profits Tax Act 1940—Profits of a trade or accretions of capital—Carrying on a business—Appellant buying and selling securities—Appeal dismissed.

Appellant, manager of a loan company, gave practically all his time for the period material to this appeal, to its business. He carried on in a small way an insurance business mostly in respect of the affairs of the loan company and drew an income from shares of the company

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but principally from mortgages and agreements of sale purchased as investments and, to a small extent, from loans and notes to shareholders of the company. He had a secretary who attended to his insurance business and investments. He paid her salary, owned the desk, typewriter and equipment used by her, and paid for a telephone and also contributed a share of the office rent. Appellant filed his income tax return for the year 1940 and was assessed by the Commissioner of Income Tax for excess profits tax. Appellant appealed to this Court.

Held: That the appellant was carrying on a business within the meaning of s. 2(1)(*g*) of the Excess Profits Tax Act 1940 and the appeal must be dismissed.

APPEAL under the provisions of the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice Angers at Winnipeg.

G. V. Thorvaldson, K.C. and *Owen E. Bryan* for appellant.

Ward Hollands, K.C. and *A. A. McGrory* for respondent.

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

ANGERS J. now (March 6, 1947) delivered the following judgment:

This is an appeal under sections 58 and following of the Income War Tax Act made applicable to matters arising under the provisions of the Excess Profits Tax Act in virtue of section 14 of the latter which enacts:

Without limiting any of the provisions contained in this Act, sections forty to eighty-seven both inclusive of the Income War Tax Act, excepting subsection three of the first paragraph of subsection five of section forty-eight, Part VIII A and section seventy-six A thereof, shall, *mutatis mutandis* apply to matters arising under the provisions of this Act to the same extent and as fully and effectively as they apply under the provisions of the Income War Tax Act, and notwithstanding anything contained in that Act the provisions of Part VIII are applicable under this Act in respect of assessments of the nineteen hundred and forty-six and subsequent taxation years.

The appellant, at a date which is not indicated in the copy of the appellant's return for the year ended December 31, 1940, forming part of the record of the Department

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of National Revenue produced, but at all events sometime in 1941, delivered to the Inspector of Income Tax at Winnipeg, province of Manitoba, his income tax return for the year ended December 31, 1940, showing a total income of $13,748.47 and deductions for donations to charitable and patriotic organizations amounting to $1,190 and for an exemption of $1,500, leaving a net taxable income of $11,058.47 and showing a general tax of $2,827.80, a surtax of $131.25 and a National Defence tax of $140.48, making a grand total of $3,099.53.

On June 10, 1941, the appellant transmitted to the said Inspector of Income Tax his excess profits tax return, showing a profit for the fiscal year ended December 31, 1940, of $903.94 and a tax at 12 per cent of $108.48, net taxable profits including the taxpayer's salary under the Income War Tax Act for the fiscal periods ending December 31, 1936, 1937, 1938 and 1939, totalling $3,564.36 and "standard profits" for such years divided by four, i.e. the duration of said periods, amounting to $891.09 and showing further a profit for the year 1940 in excess of the standard profits of $12.85 and the excess profits tax (75 per cent) payable thereon, amounting to $9.64.

A notice of assessment concerning the excess profits tax appears to have been mailed to the appellant on August 9, 1943. It shows a net taxable income in the sum of $7,366.95, an amount levied at 12 per cent amounting to $834.03 plus $29.58 for interest, an amount paid on account of capital of $633.32, leaving a balance of $250.71 on the tax levied and an amount of $29.58 for interest, making a total of $280.29, payable as at September 9, 1943.

A notice of appeal from the notice of assessment in connection with the Excess Profits Tax was served upon the Minister on or about September 7, 1943. On March 8, 1944, the Minister, acting and represented by the Income Tax Commissioner, affirmed the assessment and notified the appellant of his decision. On April 5, 1944, the appellant mailed to the Minister a notice of dissatisfaction accompanied by a statement of facts, in accordance with section 60 of the Income War Tax Act. On May 16, 1944, the Minister replied to the notice of dissatisfaction by

denying the allegations contained in the notice of appeal and the notice of dissatisfaction as far as incompatible with his decision and affirmed the assessment as levied.

Pleadings were filed by consent of the parties.

The statement of claim alleges in substance:

the appellant is and was in 1940 the manager of International Loan Company, whose head office is in the city of Winnipeg, province of Manitoba, and he resides in the said city;

the appellant was also in the said year owner of certain real estate mortgages and agreements from which he derived an income by way of interest thereon;

the appellant's taxable income for 1940 amounted to $12,666.95, being made up of salary received from International Loan Company, insurance commissions, dividends and interest earned on his real estate mortgages and agreements;

the appellant was assessed for the year 1940 under the Excess Profits Tax Act according to the following tabulation:

net income (including mortgage interest ($6,078.59) and dividend ($300), totalling $6,378.59)	$13,856	95
less donations	1,190	00
taxable income	$12,666	95
less dividend from International Loan Company, not deemed to be income from "being in business"	300	00
	$12,366	95
less salary allowed	5,000	00
leaving	$ 7,366	95

subject to 12 per cent excess profits tax—$884.03;

no part of appellant's income is derived from "being in business" or from a "business" or "one or more businesses" as defined in paragraph 2(*g*) of the Excess Profits Tax Act and the appellant is not taxable under the said Act;

in the alternative, the appellant's net income of $12,666.95 includes the sum of $6,078.59, which is the amount of interest earned on the appellant's real estate mortgage investments and agreements and such real estate

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mortgage investments are not a "business" or "one or more businesses" as defined in paragraph 2(*g*) of the Excess Profits Tax Act and consequently the said sum of $6,078.59 is not taxable under the said Act;

the appellant therefore claims:

a declaration that no part of his income is taxable under the Excess Profits Tax Act;

in the alternative, a declaration that the amount of his income from personal mortgage investments and agreements is not taxable under the said Act;

costs.

In his statement of defence the respondent pleads in substance:

he admits that the appellant is and was in 1940 the manager of International Loan Company and the owner of real estate mortgages and agreements from which he derived an income by way of interest thereon;

he admits that the appellant's taxable income for 1940 amounted to $12,666.95 made up of salary received from International Loan Company, insurance commissions, dividends and interest earned on real estate mortgages and agreements;

he admits that the appellant was assessed for the year 1940 under the Excess Profits Tax Act according to the tabulation set forth in the statement of claim;

he denies the other allegations of the statement of claim;

and adds:

the profits assessed for excess profits tax constitute the income derived by the appellant from the carrying on of one or more businesses within the meaning of paragraph (*g*) of section 2 of the Excess Profits Tax Act and the appellant was properly assessed under the provisions of section 3 of the said Act.

The only oral evidence adduced was the testimony of the appellant, which I believe appropriate to summarize briefly.

Argue testified that he is the manager of International Loan Company, which has its head office in the city of Winnipeg, and that he has a large number of shares therein and a considerable number of mortgages and agreements. He thought that the amount of these mortgages and

agreements was something over $100,000, and said that what is shown in his income tax return is correct. According to him the largest number of mortgages were on city homes but there were some on farms.

Asked if he could state how many mortgages and clear title agreements he had in 1940, Argue replied that he did not know exactly but that the number was between 60 and 70. He said that these mortgages ran from five to sometimes ten and fifteen years, but that some of the five-year mortgages were not paid off as the debtors were unable to pay. He added that some had been carried since 1929.

He stated that he had no short term mortgages and that some of his mortgages had run for some seventeen years.

He declared that he does not have to look after the interest and receipts on his mortgages, as he has a secretary who does that for him. Asked how much time he devotes personally to his mortgages, Argue gave the following information (p. 8):

A. I think about half an hour a day, and lots of days I do not devote any time. If my secretary tells me everything is up to date, I do not bother with it at all, it is only when a mortgage falls in arrears I have to pay any attention to it.

Q. As a matter of fact, are you in Winnipeg all the time or are you away?

A. No, I have to travel for the Company a great deal. We have clients and mortgage loans as far as Alberta, and I cover almost all these territories.

Q. At times you are away for weeks and months?

A. Yes, sir, sometimes two months at a time.

Q. During that time do you pay any attention to your own personal investment?

A. No, I can't do that.

Q. So they are looked after by your secretary?

A. That is correct.

Argue declared that the International Loan Company operates only a mortgage loan business and that the total amount of its loans at the beginning of 1944 was about $1,125,000.

He stated that his relations with the company were covered by an agreement dated May 31, 1921, and that he was acting as manager under this agreement in 1940. The agreement was filed as exhibit 1. He asserted that

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this agreement fully sets out all his relations with the company. According to him this agreement, which was for a period of twenty years and expired on May 31, 1941, has since been renewed.

Argue declared that he devotes all his time to International Loan Company and that he has no outside business whatever. He added that all the business of the company is carried on and that all the agreements are made in its name and that all the mortgages are in its favour.

He stated that the funds of the company are deposited in a bank designated by the Board of Directors, that he does not sign the cheques for the company alone but that there must be two signatures, viz., that of the secretary-treasurer and himself or, in case of his absence, by another director authorized to sign.

He said that International Loan Company owns the furniture, books supplies and goodwill of the company and that under the agreement (exhibit 1) he pays the rent, telephone and salaries.

He said that he became agent of an insurance company for the writing of fire insurance policies for the reason that the mortgages and securities of the company require fire insurance and, as the company did not wish to attend to that itself, it appointed him as agent. He stated that he does not carry on any other insurance business to any extent except in cases where mortgagors pay off their mortgages and wish the company to rewrite the insurance. He asserted that the revenue from his insurance activities scarcely pays the operating expenses.

He declared that the item of $15,182.72 appearing in the financial statement as "property account—personal", filed with the Inspector of Income Tax, for 1940 represents the value of his home at Winnipeg and his summer home at Matlock Beach, both of which he occupies himself and from which he draws no revenue.

Shown a financial statement as at December 31, 1940, dated April 21, 1941, signed by David Cooper and Company, accountants and auditors of Winnipeg, Argue said that it is his auditor's report of his affairs during the year 1940. This statement was filed as exhibit 2.

He stated that he made five new mortgage loans in 1940, seven in 1939 and seven in 1941. Asked by counsel for respondent if these five loans were large or small, Argue mentioned the following:

loan of $1,777.34 to W. J. Watson,
loan of $1,000 to Joseph O. Bélanger, part of which was a re-loan as the borrower already had a loan of about $500, which he discharged,
loan of $1,675.90 to Ethel E. Thorogood,
loan of $750 to Ida Higgins,
loan of $600 to Walter S. McGibbon,
loan of $835 to John Carsone.

Argue added that there is a sale of a house taken over on a mortgage from George F. Poulter, which he had to rebuild at a cost of $4,500. He said he had the title to the property and had sold it to Poulter on the instalment plan.

Argue stated that some of these loans were re-loans and that, if he were to give the figures exactly, he would have to have his secretary.

Counsel for respondent told Argue that he was informed that there are sixteen loans which do not appear in his income tax return of 1940. The witness replied that he does not know anything about it, that the auditor makes his report and that he signs it.

Referring to a loan, set forth in the witness' return for 1940, to one F. L. Young for $1,777.34, counsel told Argue that this loan must have been on his books at that time and that it did not appear in 1939. Argue replied that if the loans had been paid off they would not appear in the ledger at all.

Counsel intimated that he could give the witness the names of sixteen loans which did not appear as loans in 1939 but did appear in 1940. Argue admitted that he never checked this up, that he just took his secretary's statement and that it may be wrong. He stated that possibly some of these loans had been paid off since and that accordingly they would not appear in the ledger. He repeated that there were five loans placed in 1940 shown in the ledger.

Argue declared that the International Loan Company carries on the business of loaning money on mortgages and that besides it holds some government bonds.

He denied that he deals pretty much in his personal capacity as the company does in its corporate capacity,

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adding that all he has consists of a few savings put into these securities. He pointed out that his savings are not always put into the same securities on which the company loans money and that many times he has accommodated clients of the company with a larger percentage loan than the one to which the company is limited by law, viz., 60 per cent. He said he first started to loan his personal funds in this manner around 1925 or 1926. He added that he kept money on hand "all through the panic" and loaned to any shareholder whose shares were fully paid, who came to the office to borrow on his shares, as the company was not allowed to do this. He added that he sometimes loaned on agreements for sale, in which case the person making the loans paid the inspection fee which was added to the loan. He stated, however, that the person making the inspection is appointed by him and is under his supervision.

He declared that he loans practically nothing on notes, that he has a few old notes, which are "secured by people's shares" and that this was done just to accommodate clients. He admitted that he received interest on them, but added that they were not the class of investment that he would be looking to at all. He asserted that they were only done to accommodate clients.

He said he did not get a commission when he secured or placed a loan for the company.

Asked by counsel if, supposing he came to him to borrow $2,000, and if the witness turned it over to the company, he would get a commission, Argue replied in the negative and added (p. 22):

A. * * * if some other agent brought their loan to the Company, that agent would get a commission of one per cent, but I do not get a commission.

Q. You merely get a commission—

A. According to the contract.

Q. It is a percentage on the amount earned by the Company or something of that kind?

A. That is right.

Argue admitted that most of the mortgages include the following clause (p. 22):

And I further agree forthwith on the happening of such loss or damage by fire to furnish at my expense all the necessary proofs and do all the necessary acts to enable the mortgagee to obtain payment of the insurance moneys. Provided always that such insurance must be in a company

selected by the mortgagee, and that the mortgagee may effect same without reference to the mortgagor and charge any moneys paid by him in respect thereof upon the said lands.

He acknowledged that as a result, in addition to the interest he receives on the mortgage, he gets a commission on the insurance policies he places.

He stated that the fees which he may make out of his insurance business is his personal income and that it has nothing to do with the company. He added that he pays the expenses of attending to the insurance.

He declared that he pays his secretary himself, that he contributes a share of the office rent for the space which she occupies, that he owns the desk and all the equipment which she uses, that he pays for a telephone so that people can call up about insurance and not disturb the company. He summed up by saying (p. 24): "It is only a matter to help the company that we do this."

He admitted that sometimes the company is obliged to take back certain properties on which payments have not been made, that he has then a real estate man to look after the rental and a man to attend to the repairs. He said that he does not do that work himself.

At the request of counsel the Court adjourned at 12.05 p.m. until 2.15 p.m. in order to allow them and the witness to look into the question of the sixteen loans alluded to by Mr. Hollands. After recess counsel continued the cross-examination of appellant; a brief recital of the facts disclosed is expedient.

To the question as to whether he wished to make some explanation of his evidence at the morning session, Argue replied affirmatively and added (p. 28):

A. * * * we find that there are fourteen new mortgages instead of five.
Q. That were placed in 1940, the year in question?
A. Yes, the year 1940. Do you wish me to make an explanation.

To this question of the witness, Mr. Hollands replied (p. 28):

No, I accept the witness's statement. I don't think there was any intention to mislead the Court.

I am satisfied that the witness was in good faith. Unfortunately he was almost totally unacquainted with his business.

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Counsel for respondent observed that Argue had stated that there were only 60 or 70 mortgages outstanding in 1940 and that by checking his returns he noticed that there were 78. To this observation, Argue offered the following explanation (p. 28):

> Well, we took off the ledger a number, and evidently the ones in the discharged ledger were not included.

Asked if it would be correct to say instead of 60 or 70 there are 78 mortgages outstanding representing his personal funds, as set forth in his return, Argue answered that he did not know.

Mr. Thorvaldson here interjected the remark that the number of mortgages are in evidence by virtue of being listed in a schedule included in the statement exhibit 2. In fact the number is 78. Counsel for respondent suggested that it is not exact to say seventy-eight mortgages, as there are, besides mortgages, agreements for sale and securities on the advance of moneys whereby witness purchased an agreement for sale or possibly sold it.

Asked if each one of these investments "require a considerable amount of looking after", Argue supplied the following information (p. 29):

> A. If I was spending a lot of time looking after them I would have known this morning this statement was wrong, the fact is I don't pay much attention to them at all.
>
> Q. Amongst other things you have to find out each year is whether the taxes are paid on each individual property?
>
> A. The secretary does that.
>
> Q. And she is the secretary, you have already explained, that you pay to look after that part of your affairs?
>
> A. Along with the fire insurance.

The agreement entered into on May 31, 1921, between International Loan Company and the appellant, a duplicate whereof was filed as exhibit 1, stipulates *inter alia* that:

the agreement is entered into for a period of twenty years reckoning from June 1, 1921;

during the continuance of the agreement, the manager shall act as general agent and manager of the company;

the manager shall have the exclusive right of selling the company's shares and properties and of *acting as rental and insurance agent for the company;*

the manager shall look after the investment of the company's funds, the collection of all moneys owing to it on shares, investments, rentals or otherwise, with full power to give receipts, releases and quittances, provided that the investment of the company's funds shall be subject to the control of the Board of Directors;

the manager shall, at his own expense, provide adequate office accommodation and such clerical or other assistance, as shall be necessary to carry on the company's business;

the remuneration payable by the company to the manager for selling its shares shall be a commission of 5 per cent of the price at which the same are sold, including premiums, if any (the agreement here sets forth the conditions of payment of this commission, which have no materiality herein);

the remuneration to be paid by the company to the manager for the selling of properties shall be the usual commission paid to real estate agents in Winnipeg and the remuneration for acting as rental agent for the company shall be the usual commission charged by rental agents in Winnipeg;

for all services rendered by the manager other than the sale of shares and properties and acting as rental agent, the manager's remuneration shall be a commission of $2\frac{1}{2}$ per cent per annum on the amount of the invested funds of the company up to the sum of $250,000, and $1\frac{1}{2}$ per cent per annum on all invested funds over and above the said sum of $250,000 (there follows a proviso which is immaterial);

in addition to the remuneration to be paid to the manager as hereinabove provided, the company agrees to supply the necessary office furniture, stationery and advertising and to pay all business taxes or assessments, auditor's fees, legal fees, remuneration to directors, commission to brokers or sub-agents for procuring loans, the expense of calling meetings of shareholders, the cost of any bond or bonds which the company may require from the manager or any person employed by him or by the company in the conduct of its business and also any expense

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which may be incurred by reason of the company taking deposits under section 65 of the Loan Companies Act 1914;

all outlays and expenses in connection with the carrying on of the company's business, other than those previously mentioned, shall be paid by the manager;

all moneys received by the manager on account of sale of stock, investments, sale of properties, rentals or otherwise shall be deposited to the credit of the company in a chartered bank, as provided by the company's by-laws, and all sums owing by the company to the manager under this agreement shall be payable by cheque on the company's account on the last day of each month;

the manager covenants to faithfully perform the services required by the contract and that he will not, during the currency thereof, engage in the promotion of any other company doing business along the same lines as this company and that he will not engage in any business of any kind whatsoever which will conflict with the company's business;

the company assumes responsibility for the payment of all commissions unpaid on the sale of stock in International Loan Company and covenants that it will pay to the manager all moneys coming to him for the sale of such stock upon the terms heretofore agreed upon between the parties.

It was submitted on behalf of appellant that he is foremostly the manager of International Loan Company, whose business is the making of loans on city and farm properties and that he devotes substantially all his time to the company's business, that he has a very small insurance business operated largely in respect of the company's business and that he has an income which he derives from investments in securities.

The evidence discloses that the appellant practically gave all his time, during the period material herein, to the business of International Loan Company, that he carried on in a small way an insurance business, mostly in respect of the affairs of International Loan Company and that he drew an income from shares of the company but principally from mortgages and agreements for sale purchased

as investments and also, to a small extent, from loans on notes to shareholders of the company holding fully paid shares thereof.

Argue had a secretary who looked after his insurance business and his investments; to this part of his work Argue devoted little time. On the other hand, the proof shows that he paid his secretary's salary himself, that he contributed a share of the office rent, that he owned the desk, the typewriter and the equipment used by his secretary and that he paid for the telephone so that, according to his story, people could inquire about insurance without disturbing the company. One must not overlook the fact that this secretary not only looked after the appellant's personal business but spent a great deal of her time on the business of the company. The evidence does not reveal what portion of the time of the secretary is used on the appellant's personal business, but I think it may be inferred that it is less considerable than that devoted to the company's affairs.

Clause 4 of the agreement, hereinabove referred to, stipulates, as we have seen, that the manager shall look after the investment of the company's funds, the collection of moneys due to the company on shares, investments, rentals or otherwise, give receipts, releases, quittances for moneys so received. This work, according to Argue's uncontradicted testimony, takes up all his time and he has very little opportunity to look after his personal business. Can it be said that the appellant in investing his money in mortgages, agreements for sale, drawing the interest thereon when it became exigible, receiving the capital of his investments when they came to maturity, reinvesting his capital in mortgages or agreements for sale constitute a business? If the appellant's activities were limited to that, I would feel inclined to answer the question negatively. Were they so limited? The problem we have to solve narrows down to this question, as I think.

It was submitted on behalf of respondent that the appellant is liable to the excess profits tax under paragraph (*g*) of subsection 1 of section 2 of the Excess Profits Tax Act 1940, which reads thus:

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(*g*) "Profits" in the case of a taxpayer other than a corporation or joint stock company, for any taxation period, means the income of the said taxpayer derived from carrying on one or more businesses, as defined by section three of the Income War Tax Act, and before any deductions are made therefrom under any other provisions of the said Income War Tax Act;

Counsel for respondent contended that Argue carried on the business of (*a*) manager of a loan company, (*b*) an insurance agent and (*c*) an investor in securities in general. We are only concerned with the last one.

The evidence is unfortunately limited to the holdings of the appellant in 1940, which is the taxation year in question herein. It is incomplete and consequently unsatisfactory. Argue was generally ignorant of his personal affairs. His secretary, who looked after them, would likely have been able to give the Court more information on the subject. Why she was not called as witness is beyond my comprehension. Be that as it may, the evidence discloses that in 1940 eighteen mortgages or agreements for sale having matured, they had to be replaced or renewed, in 1939 seven and in 1941 seven. There is no evidence regarding the value of the eighteen securities renewed or replaced in 1940. In the circumstances, we do not know what proportion of the amount of $102,379.24, shown in the schedule of "clear title agreements and first mortgages" forming part of the financial statement exhibit 2, these eighteen securities represent. The total value of the seven investments mentioned by Argue in his testimony is $10,782.26, according to the figures contained in the aforesaid schedule. This amount divided by seven gives an average of $1,540.32. Now if we multiply this quotient by eighteen we get a total of $27,725.76. This sum represents a little more than one-fourth of the value of the appellant's clear title agreements and first mortgages as at December 31, 1940, which appears in the said schedule to have been $102,379.24. It seems a strange coincidence that so high a proportion of the appellant's securities should have come to maturity in the same year. Needless to say, if evidence had been adduced regarding the quantity and the value of the securities required in say the two or three years preceding and the two or three years following 1940, the Court would have been in a better position to deter-

mine whether the appellant was merely reinvesting his capital as its investments were naturally realized on their respective dates of maturity or whether he was carrying on an investment business, selling securities at a profit and replacing them by others at lower prices in the hope of disposing of them later at increased prices and drawing a benefit therefrom. Perhaps the figures for the years immediately preceding and following 1940 were not favourable to appellant's contention; that may be the reason why no evidence was adduced in relation thereto. In the circumstances, I must rely on the figures for the year 1940 only.

In practice it may often be difficult to draw the line between the cases in which the buying and selling of securities merely constitute a change of investments or amount to the carrying on of an investment business. Each case must be determined according to its own facts. Nevertheless, the following decisions may help in reaching a conclusion.

Smith v. *Anderson* (1), in which Jessel, M.R., at page 260, expressed the following opinion:

> When you come to an association or company formed for a purpose, you say at once that it is a business, because there you have that from which you would infer continuity; it is formed to do that and nothing else, and, therefore, at once you would say that the company carried on a business. So in the ordinary case of investments, a man who has money to invest, invests his money and he may occasionally sell the investments and buy others, but he is not carrying on a business. But when you have an association formed, or where an individual makes it his continuous occupation—the business of his life to buy and sell securities—he is called a stock-jobber or share-jobber, and nobody doubts for a moment that he is carrying on business.

In the case of *Californian Copper Syndicate (Limited and Reduced)* v. *Harris* (2) Clerk, L.J. made the following observations (p. 165):

> 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 realization or conversion of securities may be so assessable, where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The

(1) (1880) L.R. 15 Ch D. 247. (2) (1904) 5 Tax Cases 159.

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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 thereby seeking to make profits.

* * * *

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 realizing a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

In the case of *Cooper* v. *Stubbs* (1) the appellant Stubbs appealed against assessments made under Sch. D to the Income Tax Act, 1918, in various sums for the years ended April 5, 1921, 1922 and 1923. Stubbs was a member of a firm of cotton brokers and merchants. It was the practice for such firms to protect themselves against fluctuations in the market by buying cotton for future delivery against sales made and vice versa. These contracts for future purchase or delivery of cotton were made through the exchanges in Liverpool, New York or New Orleans. Dealings of this kind were known as dealings in "futures". The assessments in question were made upon the appellant in respect of profits made in such dealings. These dealings were private speculations of the appellant in which his firm had no interest. It was held that these transactions constituted a trade within the meaning of Sch. D, para. 1(*a*)(ii), of the Income Tax Act, 1918, and that the profits arising from such transactions were annual profits and gains chargeable with the tax.

In *Martin* v. *Lowry* (2) the headnote, fully comprehensive, reads thus:

The appellant, who was an agricultural machinery merchant, bought a gigantic consignment of linen and set to work to make people buy it, and he succeeded in selling it within a year by organizing a vast activity for that purpose. He was assessed to income tax under Schedule D on his profits on the sale of the linen, and on appeal to the Special Commissioners he contended that he did not carry on any trade in connection with linen, that the transaction was an isolated one, and that the profit was not an annual profit chargeable to income tax. The Special Commissioners held that in exercising these activities the appellant was for the time being carrying on a trade the profits of which were chargeable to income tax.

Held, that there was evidence on which the Special Commissioners could find the transaction to be in the nature of a trade, and that the fact of the profits being the income of a trade and belonging to the year

(1) (1925) 2 K.B. 753. (2) (1926) 43 T.L.R. 116.

of assessment was enough to make the profits "annual" within Case VI of Schedule D, and the decision of the Special Commissioners must be affirmed.

In the case of *Pickford* v. *Quirke* (1) it appears that during the "boom" in the Lancashire cotton trade in 1919 the appellant, in company with other persons, engaged in the operation known as "turning over" a cotton mill, i.e., acquiring a controlling interest in the mill, organizing its administration and finances and reselling it to a new company. The operation was successful and the appellant was asked to join other syndicates, composed partly of the same persons engaged in "turning over" three other mills. In each case a profit resulted to the appellant. On March 24, 1923, the Additional Commissioners for the Division in which the appellant resided signed the book containing an estimated assessment upon the appellant to income tax under Schedule D for the year 1919-20. The book was not delivered to the General Commissioners until April 18, 1923, notice was given to the appellant on May 5, 1923, and the assessment was signed by the General Commissioners on September 5, 1923. It was held, *inter alia,* that:

though each adventure of "turning over" a mill, taken singly, was not a trade, but a capital transaction, yet the succession of such adventures, in each of which the appellant took part, might constitute the carrying on of a trade, and the Special Commissioners on an appeal against the assessment were not estopped by their previous decisions from reconsidering the whole of the facts, and finding that the appellant in so doing was carrying on a trade on the profits of which he was liable to income tax and excess profits duty on the profits.

Reference may also be had with profit to the following cases: *T. Beylon and Company Limited* v. *Ogg* (2); *Gloucester Railway Carriage and Waggon Company Limited* v. *Commissioners of Inland Revenue* (3).

Konstam, in *The Law of Income Tax,* 10th ed., says (p. 104):

Controversy often arises as to whether the net proceeds of sales of investments in securities, landed property and so on are profits of a trade or accretions of capital. The test is, whether or not a trade is carried on in the buying and selling of the investments. Thus, a man who possesses a collection of pictures for his own enjoyment, and who sells one of them to meet his pecuniary necessities—or even because a tempting offer happens to be made to him—is not taxable for the proceeds of the sale (*Stevens* v. *Hudson's Bay Co.* (1909), 5 Tax C. 424. Cf. *Jones*

(1) (1927) 44 T L R 15.
(2) (1918) 7 Tax Cases 125.
(3) (1925) A.C 469.

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v. *Leeming* (1930) A.C. 415; *Hudson* v. *Wrightson* (1934), 26 Tax C. 55); but a picture dealer who has bought to sell again is liable on his net profits.

"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 * * * But enhanced values obtained from realization or conversion of securities may be so assessable, where what is done is not merely a realization 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 * * * buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby 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 realization, the gain they make is liable to be assessed for income tax.'" (*Californian Copper Syndicate* v. *Harris* (1904), 6 F. 894; 5 Tax C. 159; approved in *Commissioners of Taxes* v. *Melbourne Trust, Ltd.*, (1914) A.C. 1001, 1010, and *Ducker* v. *Rees Roturbo Syndicate* (1928) A.C. 140.

See also *Dowell's Income Tax Laws*, 9th ed., p. 546, under the heading "Sales of investments".

With only the figures of 1940, I do not see that I can reach any other conclusion than that the appellant was carrying on a business and that he is accordingly liable to the tax provided for by paragraph (*g*) of subsection 1 of section 2 of the Excess Profits Tax Act.

For the reasons aforesaid I am satisfied that the assessment and the decision of the Minister affirming it must be maintained and the appeal dismissed. The respondent will be entitled to his costs against the appellant.

Judgment accordingly.