

(1980) 11 CAL CK 0004

In the Calcutta High Court

Case No : Income-tax Reference No. 561 of 1973

Commissioner of Income Tax

APPELLANT

Vs

Gourepore Co. Ltd.

RESPONDENT

Date of Decision : 17-11-1980

Acts Referred:

Income Tax Act, 1961 — Section 28, 43(5), 73

Citation : (1982) 135 ITR 606

Hon'ble Judges : Sudhindra Mohan Guha, J; Sabyasachi Mukharji, J

Bench : Division Bench

Advocate : B.K. Bagchi and B.K. Naha, for the Appellant; D. Pal and M. Seal, for the Respondent

Judgement

Sabyasachi Mukharji, J.—In this reference, we are concerned with three assessment years, viz., the assessment years 1965-66, 1966-67 and 1967-68. In respect of these three years, only one question has been referred to this court u/s 256(1) of the I.T. Act, 1961 ;

"Whether, on the facts and in the circumstances of the case, and on a correct interpretation of Explanation 2 to Section 28, Section 43(5) and Section 73 of the Income Tax Act, 1961, the Tribunal was right in holding that the losses of Rs. 50,096, Rs. 3,06,370, and Rs. 7,000 for the assessment years 1965-66, 1966-67 and 1967-68, respectively, were not losses from speculation business and should be set off against the assessee's other income of the respective years ? "

2. The Tribunal for all these years, on this aspect, followed the principle decided by it for the assessment year 1961-62 and it will, therefore, be necessary to examine the facts found by the Tribunal and also the reasonings of the Tribunal. There, the Tribunal was concerned with the loss of Rs. 8,54,063. We may incidentally point out that the reference for the same year is in the list. We have heard the reference and shall dispose of it today after this judgment.

3. The Tribunal has noted that the assessee is a company and it has also noted

the relevant assessment year. Its business consisted of the manufacture and sale of jute goods. This fact is important. By this finding the Tribunal makes it quite clear that the assessee was carrying on two types of businesses, viz., as dealer in merchandise of jute goods as well as a manufacturer of jute goods. The amounts in question, according to the ITO, were represented to be the loss from speculative transaction within the meaning of Expln. 2 to Section 28, Section 43(5) and Section 73 of the I.T. Act, 1961. But, for the assessment year 1961-62, some of the losses were claimed within the meaning of Expln. 2 to Section 24(1) of the Indian I.T. Act, 1922. As we shall presently note, the position is identical in both the Acts. The ITO was of the view that the transaction had been ultimately settled by means other than actual delivery of stocks. Before him, it was contended that the purchase and sale of gunny included forward sales and sometimes forward sales bought back and the contracts were settled by means other than actual delivery of the goods. It was further submitted that the assessee-company was obliged to either cancel the previous order or to buy the same at a reduced rate as it received overseas orders for supply of special quality of goods where the margin of profit was higher. In these circumstances, it was claimed to be hedging contracts. The ITO rejected this contention as not falling within the meaning of the proviso to Section 43(5) of the I.T. Act, 1961, and for the assessment year 1961-62, the ITO came to the conclusion that the transactions did not come within Clause (a) to Expln. 2 to Section 24(1) of the Indian I.T. Act, 1922. According to him, the loss was the result of the assessee-company buying back the earlier forward sales to accommodate fresh contracts with a view to earning higher profit and the pattern of such transactions was not characteristic of hedging. It was further contended on behalf of the assessee that the transactions were few and isolated. This was also rejected by the ITO on the ground that, the scheme of the Act had not drawn any distinction between an isolated speculative transaction and several such transactions for the purpose of setting off the loss. It was then submitted on behalf of the assessee that the forward sales and acceptance of overseas contract necessitating purchase back of forward sales formed a composite transaction. The ITO rejected this contention on the ground that separate contracts were executed for each of the transactions and, therefore, these were independent of each other and, moreover, in terms of Section 24(1), speculative transactions were distinguishable from others. The AAC upheld the order of the ITO. There was a further appeal before the Tribunal. The Tribunal found that the assessee had the intention to supply the goods as per sale contract but considering that if it could manufacture special quality of goods to execute overseas orders it could earn better profit, the assessee switched over to the manufacture of special quality goods and settled forward contracts with the Indian buyers. It was held by the Tribunal after considering the definition of speculative transaction in Expln. 2 to Section 24(1) of the Indian I.T. Act, 1922, or prov. (a) to Section 43(5) of the I.T. Act, 1961, that the settlement of these transactions was necessary and incidental to the very carrying on of the assessee's business in the overseas supplies resulting in more profits even after setting off the loss consequent upon the

settling of the contract of sale with the Indian buyers. The Tribunal thus held that the net result was admittedly a hedging profit and not a speculative loss. In that view of the matter, the Tribunal allowed these losses. The question is the propriety of this view expressed by the Tribunal.

4. On behalf of the revenue, it was contended that the intention of the parties, as such, was not relevant. It was further submitted that the overt act of the party or the conduct of the party where there was no delivery of the goods is the most important factor in deciding the issue. On behalf of the revenue it was also urged that the contracts in question formed part of an integrated transaction was also not quite relevant. Similarly, it was urged that the finding of the Tribunal that the settlement of these transactions was incidental and necessary for carrying out the business was also relevant and it was finally submitted that it was not a hedging contract.

5. Now, so far as the question, the Tribunal has held that it is a hedging contract or a contract which is covered by prov. (a) to Section 43(5) of the I.T. Act, 1961, or Expln. 2 to Section 24(1) of the Indian I.T. Act, 1922, it was observed that it was essentially a question of fact and, therefore, this finding not being separately challenged as such as perverse, these contentions were not open. For this reliance was also placed on the observations of the Supreme Court in the case of COMMISSIONER OF Income Tax, KERALA Vs. JOSEPH JOHN., , where the Supreme Court reiterated that the burden of proof was upon the assessee to show that the transactions carried out by him were not speculative transactions but merely hedging transactions within the meaning of prov. (a) to Expln. 2 to Section 24(1) of the Indian I.T. Act, 1922. The finding of the Appellate Tribunal that the transactions carried out by the assessee were speculative transactions and not a hedging transaction was essentially a finding on a question of fact which was not open to the High Court to interfere with the finding unless there was no evidence to support that finding or it was perverse. It was also held that the respondent was a trader in cocoanut oil and he could not deduct his losses in the settlement of forward contracts in cocoanut oil as the business losses u/s 10, as they were losses in a speculative transaction within the meaning of the first proviso to Section 24(1) of the Indian I.T. Act, 1922. It would be proper to appreciate the position in the subsequent decision to refer to the relevant provisions of the Act. Section 24(1) of the Indian I.T. Act, 1922, dealt with this aspect of the matter. Section 24 permitted the assessee to set off profits against the losses under any other heads provided such losses did not occur from speculative transactions. Explanation 2 to Section 24(1) of the Indian I.T. Act, 1922, reads as follows :

"Explanation 2;--A speculative transaction means a transaction in which a contract for purchase and sale of any commodity including stocks and shares is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scraps :

Provided that for the purposes of this section,--

(a) a contract in respect of raw materials or merchandise entered into by a person in the course of his manufacturing or merchanting business to guard against loss through future price fluctuations in respect of his contracts for actual delivery of goods manufactured by him or merchandise sold by him ; or

(b) a contract in respect of stocks and shares entered into by a dealer or investor therein to guard against loss in his holdings of stocks and shares through price fluctuations; or

(c) a contract entered into by a member of a forward market or a stock exchange in the course of any transaction in the nature of jobbing or arbitrage to guard against loss which may arise in the ordinary course of his business as such member ;

shall not be deemed to be a speculative transaction."

6. The position which was there in Section 24, read with that Explanation, has been modified by several sections in the new Act. We must first refer to Expln. 2 to Section 28 of the I.T. Act, 1961, which provides for profits and gains of business or profession :

"Where speculative transactions carried on by an assessee are of such a nature as to constitute a business, the business (hereinafter referred to as "speculation business") shall be deemed to be distinct and separate from any other business."

7. Section 43(5) of the new Act is important and it provides as follows:

"43. (5) "speculative transaction" means a transaction in which a contract for the purchase or sale of any commodity, including stocks and shares, is periodically or ultimately settled otherwise than by actual delivery or transfer of the commodity or scrips :

Provided that for the purposes of this clause--

(a) a contract in respect of raw materials or merchandise entered into by a person in the course of his manufacturing or merchanting business to guard against loss through future price fluctuations in respect of his contracts for actual delivery of goods manufactured by him or merchandise sold by him ; or

(b) a contract in respect of stocks and shares entered into by a dealer or investor therein to guard against loss in his holdings of stocks and shares through price fluctuations ; or

(c) a contract entered into by a member of a forward market or stock exchange in the course of any transaction in the nature of jobbing or arbitrage to guard against loss which may arise in the ordinary course of his business as such member ;

shall not be deemed to be a speculative transaction."

8. Sub-section (1) of Section 73 of the new Act stipulates that any loss,

computed in respect of a speculation business carried on by the assessee, shall not be set off except against profits and gains, if any, of another speculation business.

9. In the decision to which we were referring, viz., the decision in the case of COMMISSIONER OF Income Tax, KERALA Vs. JOSEPH JOHN., , the Supreme Court had made the observation which we have set out hereinbefore in the context of Explan. 2 to Section 24(1) of the Indian I.T. Act, 1922. There, at page 77 of the report, the Supreme Court reiterated the aforesaid observations.

10. It is also well settled that whether a particular finding is perverse or bad as there being no evidence to support it is a question which is to be separately raised. Now, that question has not been raised in the instant case. The Tribunal has made a categorical finding that this was a hedging transaction or, in other words, it came within the meaning of Explan. 2 to Section 24 of the Indian I.T. Act, 1922, or prov. (a) to Section 43(5) of the I.T. Act, 1961. The Tribunal has given several reasons to support its conclusion, which we have just mentioned, viz., the following: (a) that the business of the assessee consisted both of manufacture and sale of jute goods; (b) that the contracts were bad (sic); (c) that the company had got overseas orders for supply of special quality of goods where the margin of profit would be higher. The Tribunal found that the assessee had all along the intention to supply the goods as per sale contracts but considering that if it could manufacture special quality of goods to execute overseas orders it could earn better profits and the assessee switched over to the manufacture of special quality of goods and settled forward contracts with the Indian buyers. The Tribunal found that the settlement of these transactions was necessary and incidental to the very carrying on of the assessee's business of overseas supplies resulting in more profits even after setting off the loss consequent upon the settling of the contract of sale with the Indian buyers. The Tribunal in those circumstances came to the conclusion that these were hedging contracts. As we have said before, there is no question challenging that finding of the Tribunal.

11. In this connection, reliance was placed on several decisions which we shall presently note. Reliance was first placed on a decision of the Andhra Pradesh High Court in the case of OMKARMAL AGARWAL Vs. COMMISSIONER OF Income Tax, A. P., , where the assessee was carrying on business in buying raw cotton, ginning it, and converting it into lint with the aid of machinery, and selling lint and cotton seed. The assessee entered into 14 forward contracts for the delivery of lint at a future date, and these contracts were settled without effecting delivery of the goods and even before the time fixed for completion of the contract. There were no contracts in respect of raw materials or merchandise. The assessee claimed that the transactions were not speculative transactions since, according to him, they were hedging contracts to guard against possible loss from another set of transactions. The ITO accepted the contention of the assessee and allowed set off of the loss arising from these transactions against

the income from property and other business. The Commissioner of Income Tax reversed the order of the ITO u/s 33B, taking the view that the transactions were speculative in nature. The Tribunal agreed with the view of the Commissioner.

12. It was held by the Andhra Pradesh High Court that as there were no contracts in respect of raw materials or merchandise, to guard against loss through future price fluctuations, the transactions were speculative in nature falling within Expln. 2 to Section 24(1) and were not saved by Clause (a) of the proviso to Expln. 2. Proviso to Section 24(1) enacts a substantive rule of law and its operation was not confined to cases where the loss under one head of income was sought to be set off against profits under another head. There, at page 335 of the report, the court noted that the assessee was buying kapas (raw cotton), ginning it and selling lint and cotton seed. In respect of the impugned transactions there were only one set of contracts and not two sets as required by Clause (a) of the proviso to Expln. 2. That proviso contemplated two contracts : (1) a contract for actual delivery of goods manufactured by the assessee or merchandise sold by him, and (ii) a contract in respect of raw materials or merchandise entered into in the course of the assessee's manufacturing or merchandising business to guard against loss through future price fluctuations. In that case there were no contracts in respect of raw materials or merchandise. It is true that, in this case, there were contracts in the sense that the Tribunal seems to indicate that there were contracts first for selling the goods to the Indian buyers and there were also contracts for buying back these contracts in order to guard against loss. So to facilitate the earning of higher profits by the assessee for the special quality of the goods the existing contract is breached. Therefore, the ratio of the decision of the Andhra Pradesh High Court would not apply to the facts found, in the instant case, by the Tribunal.

13. On the meaning of the expression what is "a hedging contract", our attention was drawn to a decision of the Allahabad High Court in the case of RAGHUNATH DAS PRAHLAD DAS Vs. COMMISSIONER OF Income Tax, KANPUR., . There the Division Bench held that Clause (a) of the proviso to Section 43(5) of the I.T. Act, 1961, did not safeguard a loss in the value of goods or merchandise in stock; but it contemplated the loss likely to be suffered in respect of a particular contract. The clause applied only if the following circumstances existed : (1) there was a contract for actual delivery of goods manufactured by the assessee or merchandise sold by it; (2) the assessee must by a subsequent transaction intend to guard against losses through future price fluctuations in respect of such contract; and (3) the transaction in question must be a contract entered into in respect of raw materials or merchandise in the course of the assessee's manufacturing business and it should have been settled otherwise than by actual delivery of goods. Unless the assessee showed that there was some existing contract in respect of which he was likely to suffer a loss because of future price fluctuations and that it was to safeguard against such loss that he entered into the forward contracts of sale, he could not claim the benefit of Clause (a) of the proviso to Section 43(5). In the instant case, because of the facts mentioned

hereinbefore, the Tribunal had made those findings of fact and those findings of fact have not been challenged by any separate question. Therefore, in our opinion, If would come within the ratio of hedging contract as stipulated by the Allahabad High Court.

14. Where the contracts have been breached and as a result of that breach damages have been suffered, and thus a settlement of damages, as it came in the form of settlement in a particular manner, such a transaction cannot come within the purview of prov. (1) of Expln. 2 to Section 24(1) of the Indian I.T. Act, 1922. This proposition, in our opinion, is well settled by the decision of this court in the case of COMMISSIONER OF Income Tax, WEST BENGAL Vs. PIONEER TRADING COMPANY PRIVATE LTD., , the decision of the Division Bench of this court in the case of Daulatram Rawatmull Vs. Commissioner of Income Tax (Central), , and the decision of the Division Bench of this court in the case of Commissioner of Income Tax Vs. Ramjeewan Sarawgee and Sons., . But, in this case, the findings of the Tribunal, as we have mentioned before, are that the contract had been entered into when the assessee had an intention to supply the goods, but when it found that it could manufacture special quality of goods to execute overseas orders the assessee supplied special quality of goods and these were necessary and incidental to the very carrying on of the assessee's business of overseas supplies resulting in more profits even after setting off the loss consequent upon the settling of the contract of sale with the Indian buyers. The Tribunal also noted that the assessee's case was that the forward sales and the acceptance of overseas contract necessitating a purchase back of forward sales form a composite transaction, because if it wanted to earn more profit by receiving overseas contracts for the supply of special quality of goods, then the assessee had an option either to pay the damages or to forgo the earning of larger profits by delivery of goods or to buy back the contract in order to safeguard itself. This is precisely what the assessee did.

15. Our attention was drawn to the decision of the Calcutta High Court in the case of Abdul Gani Haji Habib and Others Vs. Commissioner of Income Tax, , where the Division Bench held that the transactions were settled by payment of difference. Here, the transactions entered into, were not settlement by payment of any difference. The Division Bench further held that the proviso to Section 24 did not contemplate that the speculative transactions should form a separate unit. We are not concerned with this aspect of this argument.

16. Reliance was placed on the decision in the case of Pankaj Oil Mills Vs. Commissioner of Income Tax, Gujarat, , where the Gujarat High Court took into consideration the circular that was issued by the Central Board of Revenue being Circular No. 4 (124)-60 TPL of September 12, 1960. There the assessee was carrying on business of manufacturing oil. In the previous year relevant to the assessment year 1965-66, the assessee entered into certain forward transactions of sale of oil tins. The transactions were ultimately settled otherwise than by the actual delivery of goods and the settlement resulted in a loss of Rs. 27,157,

which the assessee claimed as a business loss. The ITO, following the decision of the High Court in *Chimanlal Chhotalal Vs. Commissioner of Income Tax, Gujarat*, held that forward contracts only for the purchase of raw materials entered into by an assessee in the course of his manufacturing business to guard against loss through price fluctuations in respect of his forward contracts of sale for the actual delivery of goods manufactured by him were saved and excepted by the proviso from the class of speculative transactions as denned in Section 43(5) of I.T. Act, 1961, and, therefore, the loss incurred as a result of such contracts of sale was not entitled to be set off against the other business income. Before the Tribunal it was contended on behalf of the assessee that the contracts of sale entered into by the assessee were for all intents and purposes, what were known commercially as "hedging contracts" entered into with a view to guarding against loss through future price fluctuations of the groundnut oil in respect of which it had entered into certain forward transactions and since the assessee had sufficient stock on hand to meet the obligations of supplying oil tins under the said contracts, the loss of Rs. 27,157 suffered by it was a hedging loss which the assessee was entitled to set off against its other business income as clarified and permitted by the Central Board of Revenue in the Circular referred to above. Therefore, the revenue was in error in disallowing the set-off. The Tribunal agreed with this contention except that it felt itself unable to permit the set-off of the loss in question against the business income of the assessee, since the Circular was inoperative and ineffective so far as Gujarat was concerned in view of the decision of the Gujarat High Court. It was held by the Gujarat High Court that hedging contracts in order to be out of speculative transactions must be in respect of only raw materials so far as the manufacturer is concerned though these contracts may be both with regard to sales and purchases. Hedging contracts need not succeed the contracts for sale and actual delivery of goods manufactured but the latter may be subsequently entered into provided they were within a reasonable time not exceeding generally the assessment year. In order to be genuine and valid, the total of such transactions of hedging contracts of sales should not exceed the total stocks of raw materials or the merchandise on hand which will include existing stocks as well as the stocks acquired under the firm's contracts of purchases. The decision of the Gujarat High Court in *Chimanlal Chhotalal Vs. Commissioner of Income Tax, Gujarat*, was overruled. The assessee was not entitled to the set-off.

17. Reliance was placed on the following observations of the Full Bench in *Pankaj Oil Mills Vs. Commissioner of Income Tax, Gujarat*, appearing at pp. 829 and 830 and reliance was also placed on the meaning of the expression "Hedge" from the book *Regulation of Forward Markets*, at p. 9, by a well-known Economist, W. R. Natu. There it was observed :

"The hedge contract is so called because it enables the person dealing with the actual commodity to hedge themselves, i.e., to insure themselves against adverse price fluctuations. A dealer or a merchant enters into a hedge contract when he sells or purchases a commodity in the forward market for delivery at a

future date. His transaction in the forward market may correspond to a previous purchase or sale in the ready market or he may propose to cover it later by a corresponding transaction in the ready market, or he may offset it by a reverse transaction on the forward market itself.

To take an illustration, a merchant may go to the ready market and purchase cotton. He may purchase it for selling it again later to a mill for manufacturing it into cloth, in which case he might hold it in his stock for a time, say, one month. If he buys the cotton at Rs. 800 per candy, and during the month, the price falls to Rs. 750 per candy, he would, be making a loss of Rs. 50 per candy. He thus undertakes a risk when he buys cotton in the ready market and stocks it for a period of time, and naturally tries to find a way by which the risk can be reduced. He, therefore, goes to the forward market and sells cotton forward contract for delivery after one month, at, say, Rs. 770 per candy. The purchase transaction in the ready market is thus counterbalanced by a sale transaction in the forward market. At the end of one month, if the ready price has fallen by Rs. 50 he would be put to a loss in the ready market, when he offsets his original purchase by a sale in that market. At the same time, however, he would also be offsetting his original sale on the forward market by a corresponding purchase in that market. Since the course of prices in the forward market generally follows the same trend as in the ready market, he would be purchasing in the forward market also at a lower price, perhaps at Rs. 720 per candy, making a profit of Rs. 50 per candy. He would thus make a profit on the forward market which would reduce or at times even more than wipe out the loss that he suffers on the ready market. In this way, he is able to reduce his risk and cut his losses by recourse to the forward market and might even in favourable circumstances end up with a profit on balance.

To take another illustration, an exporter of castor oil may contract to sell 100 tons of castor oil to an importer in U.S.A., delivery to be effected after two months, at the rate of Rs. 1,650 per ton. Immediately after the conclusion of the contract, the exporter would buy in the forward market about 4,000 candies of castor seed which is roughly equivalent to 100 tons of castor oil. Subsequently, he would start purchasing ready castor oil in the market to fulfil his export commitment, and as and when he buys ready castor oil he would liquidate his purchase position in the forward market. If between the time he concluded the export deal and the actual purchase of ready oil, the price of castor oil had advanced, he would incur a loss in his dealings in the ready commodity for export, but as the forward price of castor seed also would have gone up during the time, he would realise a corresponding profit in his dealings on the forward market.

Thus, by resorting to counterbalancing transactions in the market for the ready commodity on the one hand and in the hedge market on the other hand, the hedger seeks to safeguard his position. The movement of prices in the two markets may not always follow an identical course and the hedger might at times

gain and at times lose but such a gain or loss would be marginal and far less than what it would be if the person had not hedged at all. While, however, the hedging operation protects the hedger against loss arising from adverse fluctuations in prices, it also prevents him from making windfall profit owing to favourable fluctuations in prices as well. The forgoing of such a possible windfall profit is the price which he pays for the insurance against loss."

18. It was observed by the Division Bench of the Gujarat High Court that the technique of hedging was both ways with regard to guarding against price fluctuations. This is one of the aspects with which the Gujarat High Court was concerned. Here, the party which is both a manufacturer and seller had all intention to supply the goods as per contract but considering that if it could manufacture special quality of goods to execute overseas orders it could earn better profits, the assessee switched over to the manufacture of special quality of goods in order to earn higher profits even after setting off the loss consequent upon the settling of the contract of sale with the Indian buyers. Such a transaction really amounts to guarding itself against future price fluctuations. The Tribunal held that the net result was admittedly hedging profit and not speculation loss. This is the finding of fact arrived at by the Tribunal. Therefore, even applying the ratio of the meaning of the word "hedge" as held by the Gujarat High Court, the said ratio would not make the present finding of the Tribunal bad in law. Furthermore, so far as the hedging contract is concerned, the conclusions of the Gujarat High Court are as follows (p. 841 of 115 ITR);

"(1) Hedging, contracts in order to be out of speculative transactions, must be in respect of only raw materials so far as the manufacturer is concerned though these contracts may be both with regard to sales and purchases.

(2) Hedging contracts need not succeed the contracts for sale and actual delivery of goods manufactured, but the latter may be subsequently entered into, provided they are within the reasonable time not exceeding generally the assessment year.

(3) In order to be genuine and valid hedging contracts of sales, the total of such transactions should not exceed the total stocks of the raw

materials or the merchandise on hand which would include existing stocks as well as the stocks acquired under the firm contracts of purchases."

19. In this case in view of the facts found by the Tribunal and in the background of the desire to earn more profit and the background that the assessee was both a manufacturer and a seller, we are of the view that the Tribunal was not in error in coming to the conclusion as it did.

20. Reliance was placed on the decision of the Delhi High Court in the case of M.R. Dhawan and Co. Vs. Commissioner of Income Tax, . There, the facts upon which the Delhi High Court proceeded were entirely different. So far as the principle of law laid down by the Delhi High Court is concerned, we are in

respectful agreement. Our attention was drawn to several decisions of the Supreme Court, namely, the decisions of the Supreme Court in *Nirmal Trading Co. and Jute Investment Co. Ltd. Vs. Commissioner of Income Tax (Central), Calcutta*, the assessee, who was a dealer in paper, hessian and B-Twill, entered into several transactions of sale and purchase with different parties. The transactions were settled by handing over delivery orders and payment by cheque. There was no evidence that actual delivery of the goods was ever effected. There the facts were entirely different. The Supreme Court was of the view that actual delivery was necessary. Similar is the ratio of the principle in the decision by the Supreme Court in the case of *Jute Investment Co. Ltd. Vs. Commissioner of Income Tax, West Bengal*, . Reliance was also placed on the decision of the Bombay High Court in the case of *Seksaria Riswan Sugar Factory Ltd. Vs. Commissioner of Income Tax*, , where the High Court explained the meaning of the hedging contract. There the question arose in the context of different facts. Reliance was placed on the decision of the Bombay High Court in the case of *Kirtilal Jaisinglal and Co. Vs. Commissioner of Income Tax, Bombay City-I*, . There the case was decided in the context of a circular issued by the Central Board of Revenue with which we are not concerned. That circular was binding on the revenue. That circular clarified the provisions of Section 24 of the I.T. Act, 1922. That circular exempted its application with regard to merchandise in hand. As we are not concerned with such circular, we find no warrant to restrict the meaning of the proviso (a) to Section 43(5) of the I.T. Act.

21. Reliance was also placed on the decision of the Bombay High Court in the case of *Sind National Sugar Mills P. Ltd. Vs. Commissioner of Income Tax*, , where the Bombay High Court, at pp. 745 and 746, explained the ratio of the Supreme Court decision, thus :

"It may be noted further that the decision in *Davenport and Co. Pvt. Ltd. Vs. Commissioner of Income Tax, West Bengal-II*, has been considered by a Division Bench of this court (to which I was a party) in *Commissioner of Income Tax Vs. Indian Commercial Co. P. Ltd.*, . The Supreme Court decision in *Davenport and Co. Pvt. Ltd. Vs. Commissioner of Income Tax, West Bengal-II*, has been read and explained in that decision to mean that the question whether a transaction is a speculative transaction in a general commercial sense under the Contract Act is irrelevant whilst considering the provisions of the I.T. Act. According to the Division Bench a transaction which is otherwise speculative would not be speculative within the meaning of Expln. 2 to Section 24(1) if actual delivery of the commodity takes place ; on the other hand, a transaction which is not otherwise speculative in nature may yet have to be regarded as speculative according to the Explanation if there is no actual delivery of the commodity. Mr. Vakild submitted that the word "ultimately" in the Explanation was required to be understood properly and if it was properly understood, the intermediate transactions which were settled on payment of differences would have to be considered as non-speculative if, in the ultimate transaction, delivery was

effected. This view runs counter to the decision of the Supreme Court in *Davenport and Co. Pvt. Ltd. Vs. Commissioner of Income Tax, West Bengal-II*, , as understood by the Division Bench of this court in *Commissioner of Income Tax Vs. Indian Commercial Co. P. Ltd.*, . It may be pointed out that in *Thakurlal Shivprakash Poddar Vs. Commissioner of Income Tax*, , a view has been taken which may help the assessee. However, in our opinion, the said decision, where Sohani J. agreed with Oza J., on a difference of opinion between Kondiah J. and Oza J., runs counter to our reading of *Davenport and Co. Pvt. Ltd. Vs. Commissioner of Income Tax, West Bengal-II*, and we have expressly so held in our judgment in *Seksaria Riswan Sugar Factory Ltd. Vs. Commissioner of Income Tax*, . Applying the principles laid down clearly by the Supreme Court in *Davenport and Co. Pvt. Ltd. Vs. Commissioner of Income Tax, West Bengal-II*, , the contentions advanced on behalf of the assessee cannot be accepted and the transactions, where delivery is not effected but differences paid, will have to be regarded as speculative transactions in view of the language employed in Explan. 2 to Section 24(1). If that be so, the ITO, the AAC and the Tribunal were all right in holding that the loss suffered by the assessee in such transactions could not be set off against its other income but would be required to be considered separately as is provided by Section 24(1)."

22. As we have mentioned before, in this case, in view of the facts particularly found by the Tribunal in the background of the facts that it is a hedging contract and that being not challenged by a separate question, we are of the opinion that the ratio of the said decision would not in any way go against the finding of the Tribunal in this case. In that view of the matter and the reasons mentioned hereinabove, we are of the opinion that the question referred to us must be answered in the affirmative and in favour of the assessee. Each party to pay and bear its own costs.

Sudhindra Mohan Guha, J.

23. I agree.