

(1967) 08 GUJ CK 0001

In the Gujarat High Court

Case No : Income-tax Reference No. 18 of 1966

Commissioner of Income Tax

APPELLANT

Vs

S.C. Kothari

RESPONDENT

Date of Decision : 03-08-1967

Acts Referred:

Forward Contracts (Regulation) Act, 1952 — Section 15(1), 15(4), 18, 2
Income Tax Act, 1922 — Section 10, 24(1)

Citation : (1968) 69 ITR 1

Hon'ble Judges : P.N. Bhagwati, Acting C.J.; B.J. Divan, J

Bench : Division Bench

Advocate : J.M. Thakore, -General, for the Appellant; K.H. Kaji and K.C. Patel, for the Respondent

Judgement

Bhagwati, Actg. C.J.

1. This reference arises out of two applications for reference made before the Tribunal, one by the assessee and the other by the Commissioner. There are in all four questions referred to us for our opinion and out of them, the first two questions are referred on the application of the Commissioner and the last two questions are referred on the application of the assessee. In order to appreciate how the questions arise for determination, it is necessary to notice the facts giving rise to the reference in some detail.

2. The assessee is a registered firm and it carries on business as commission agent and general merchant and it also trades in forward contracts in groundnut seeds, groundnut-oil and groundnut oil cakes. It is a member of the Saurashtra Oil and Oil Seeds Association Limited, an association recognised by the Central Government, inter alia, for groundnut-oil, groundnut seeds and groundnut-oil cakes u/s 6 of the Forward Contracts (Regulation) Act, 1952. During Samvat year 2013, which was the relevant accounting year for the assessment year 1958-59, the assessee entered, inter alia, into two classes of forward contracts in groundnut oil, groundnut seeds and groundnut-oil cakes. One class consisted of

the forward contracts which were admittedly not in violation of any prohibition imposed under the Forward Contracts (Regulation) Act, 1952, while the other class consisted of forward contracts which according to the revenue, were in violation of the prohibition imposed u/s 15, sub-sections (1) and (4) of that Act. The assessee incurred a profit of Rs. 2,19,046 in the first class of forward contracts and a loss of Rs. 3,40,443 in the second class of forward contracts. The assessee also earned profit in its other business which did not consist of forward contracts. In the course of the assessment of the assessee for the assessment year 1958-59, the question arose whether the loss of Rs. 3,40,443 was liable to be set off against the profit of Rs. 2,19,046 and the other profit earned by the assessee in order to arrive at the assessable income of the assessee. The Income Tax Officer took the view that the forward contracts resulting in the loss of Rs. 3,40,443 were illegal since they were hit by section 15, sub-sections (1) and (4) and not being non-transferable specific delivery contracts, they were not saved from the mischief of those sub-sections by section 18. The Income Tax Officer held that the forward contracts being illegal, the loss arising from the forward contracts was not liable to be taken into account in computing the assessable income of the assessee and he, therefore, ignored the loss of Rs. 3,40,443 in arriving at the assessable income of the assessee. The Income Tax Officer also held that in any event even if the loss of Rs. 3,40,443 arising from the forward contracts was liable to be taken into account, it was a loss in speculative transactions and the assessee was, therefore, not entitled to set it off against its other income except to the extent to which such income represented profit in any other business consisting of speculative transactions. The assessee carried the matter in appeal before the Appellate Assistant Commissioner but the Appellate Assistant Commissioner took the same view and holding that the forward contracts were illegal by reason of section 15, sub-sections (1) and (4), he refused to take into account the loss of Rs. 3,40,443 in computing the assessable income of the assessee. This view rendered it unnecessary for the Appellate Assistant Commissioner to go into the question whether the assessee was entitled to set off the loss of Rs. 3,40,443 against the whole of its other profit or only against that part of the profit which was referable to other business in speculative transactions. The assessee thereupon preferred a further appeal to the Tribunal and this time the appeal met with partial success. The Tribunal disposed of the appeal by means of two orders. The first order, which was styled as "Remand order", disposed of the question as to whether the forward contracts entered into by the assessee were illegal by reason of contravention of section 15, sub-sections (1) and (4), and the loss of Rs. 3,40,443 arising from those forward contracts was liable to be taken into account in computing the total income of the assessee. The Tribunal held that the forward contracts were non-transferable specific delivery contracts and were, therefore, outside the mischief of section 15, sub-sections (1) and (4), and that, in any event, even if section 18 did not save the forward contracts, they were not hit either by section 15, sub-section (1), or section 15, sub-section (4). The Tribunal thus came to the conclusion that the forward contracts were valid and legal contracts and the loss

arising from them was liable to be taken into account as loss from business. But the Tribunal also went further and observed that, even if the forward contracts were illegal, the loss of Rs. 3,40,443 arising from them would still be liable to be taken into account as business loss in computing the total income of the assessee. This view taken by the Tribunal necessitated the consideration of the question - which the Appellate Assistant Commissioner had not examined on the view taken by him - whether the loss of Rs. 3,40,443 was liable to be set off against the whole of the other profit of the assessee or only against that part of the profit which was referable to the business of speculative transactions and a decision of this question obviously depended upon whether the loss of Rs. 3,40,443 was a loss sustained in speculative transactions. On this point the Appellate Assistant Commissioner had not come to any finding in the view taken by him as regards the main question and the Tribunal, therefore, called for a remand report from the Appellate Assistant Commissioner on the point. The Appellate Assistant Commissioner submitted his remand report stating that, in his opinion, the forward contracts were speculative transactions within the meaning of the second Explanation to section 24(1) of the Act and the loss of Rs. 3,40,443 arising from the forward contracts was, therefore, loss sustained in speculative transaction attracting the applicability of the first proviso to section 24(1) and by reason of that proviso the loss of Rs. 3,40,443 could be set off only against the profit of Rs. 2,19,046, which was earned in the other forward contracts which were admittedly speculative transactions. The Tribunal, by its second order, agreed with the view taken by the Appellate Assistant Commissioner and permitted set off the loss of Rs. 3,40,443 only to the extent of the profit of Rs. 2,19,046, by reason of the first proviso to section 24(1) and disallowed the claim of set off of the balance of Rs. 1,21,397 against the other profit of the assessee. The assessee and the Commissioner were both dissatisfied with the decision of the Tribunal and they, therefore, preferred applications for reference of the questions of law arising out of the two orders of the Tribunal and on the application of the Commissioner the following two questions, namely :

"(1) Whether, on the facts and in the circumstances of the case, the contract in respect of which the loss of Rs. 3,40,443 was claimed were illegal contracts and were not validly entered into under the Forward Contracts (Regulation) Act, 1952 ?

(2) Whether, even assuming the transactions in which the loss of Rs. 3,40,443 was incurred were illegal transactions, the assessee would be entitled to the set off of the said loss ?"

and on the application of the assessee, further two questions, namely :

"(3) Whether, on the facts and in the circumstances of the case, the transactions resulting in a loss of Rs. 3,40,443 were speculative transaction for the purposes of section 24 of the Indian Income Tax Act, 1922, merely on the ground that the assessee had not performed the contracts by giving delivery and had paid damages in settlement of the obligations contracted for ?

(4) Whether, on the facts and in the circumstances of the case, the assessee is entitled to set off the balance of the loss of Rs. 1,21,397 against the assessee's other income ?"

were referred by the Tribunal for the determination of this court.

3. The point which arises for consideration in the first question is whether the forward contracts resulting in the loss of Rs. 3,40,443 (hereinafter referred to as the impugned contracts) were illegal by reason of contravention of section 15, sub-sections (1) and (4), of the Forward Contracts (Regulation) Act, 1952. It will be convenient to set out the relevant statutory provisions bearing on this question. Section 2(i) of the Act defines "ready delivery contract" as meaning "a contract which provides for the delivery of goods and the payment of a price therefore, either immediately or within such period not exceeding eleven days after the date of the contract". "Forward Contract" is defined in section 2(c) as meaning "a contract for the delivery of goods at a future date and which is not a ready delivery contract". Section 2(m) defines "specific delivery contract" as meaning "a forward contract which provides for the actual delivery of specific qualities or types of goods during a specified future period at a price fixed thereby or to be fixed in the manner thereby agreed and in which the names of both the buyer and the seller are mentioned". Section 2(f) defines "non-transferable specific delivery contract" as meaning "a specific delivery contract, the rights or liabilities under which or under any delivery order, railway receipt, bill of lading, warehouse receipt or any other document of title relating thereto are not transferable" and finally section 2(n) defines "transferable specific delivery contract" as meaning "a specific delivery contract which is not a non-transferable specific delivery contract".

4. Chapter III deals with the subject of recognised associations and contains a fasciculus of sections dealing with recognition of associations and the power to make rules and bye-laws of recognised associations. Section 5 provides that any association concerned with the regulation and control for forward contracts which is desirous of being recognised for the purposes of the Act may make an application in the prescribed manner to the Central Government and section 6 enacts that, if the Central Government is satisfied that it would be in the interest of the trade and also in the public interest to grant recognition to the association which has made an application u/s 5, "it may grant recognition to the association in such form and subject to such conditions as may be prescribed or specified, and shall specify in such recognition the goods or classes of goods which respect to which forward contracts may be entered into between members of such association or through or with any such member". Section 7 provides for withdrawal of recognition; section 8 confers power on the Central Government to call for periodical returns or direct inquiries to be made and under this section the recognised association is required to furnish to the Central Government periodical returns relating to the affairs of its members and the Central Government can also order an inquiry in relation to the affairs of any of the

members of the recognised association. Sections 9 and 9A are not material and we need not pause to consider them. Section 10 empowers the Central Government to direct any recognised association to make any rules or to amend any rules made by the recognised association. Section 11, which is the only other section material to be considered, provides by sub-sections (1) that any recognised association may, subject to the previous approval of the Central Government, make bye-laws for the regulation and control of forward contracts, and sub-section (2) of this section sets out, in particular, various matters in relation to which provision may be made by such-bye-laws. Clause (g) of sub-section (2) refers to the provision for "regulating the entering into, making, performance, rescission and termination of contracts, including contracts between members.... or between a member of the recognised association and a person who is not a member.." and clause (p) refers to the provision for "the regulation of dealings by members of their own account". In exercise of the statutory authority conferred u/s 11 bye-laws were made by the association for regulation and control of forward contracts between members of the association or through or with any such member and these bye-laws were altered and amended from time to time by the association. We are concerned in this reference with the bye-laws which were in force during the relevant previous year, but through some inadvertence the bye-laws which were annexed by the Tribunal to the statement of the case were bye-laws as amended up to 1st August, 1963, and, therefore, by consent of parties we substituted the bye-laws in force during the relevant previous year for the bye-laws annexed to the statement of the case.

5. Proceeding further with the examination of the scheme of the Act, Chapter IV contains provisions conferring authority on the Central Government to prohibit certain classes of forward contracts. Section 15, sub-sections (1) and (4) enact :

"15. (1) The Central Government may, by notification in the Official Gazette, declare this section to apply to such goods or class of goods and in such areas as may be specified in the notification, and thereupon, subject to the provisions contained in section 18, every forward contract for the sale or purchase of any goods specified in the notification which is entered into in the area specified therein otherwise than between members of a recognised association or through or with any such member shall be illegal....

(4) No member of a recognised association shall, in respect of any goods specified in the notification under sub-section (1), enter into any contract on his own account with any person other than a member of the recognised association, unless he has secured the consent or authority of such person and discloses in the note, memorandum or agreement of sale or purchase that he has bought or sold the goods, as the case may be, on his own account :

Provided that, where the member has secured the consent or authority of such person otherwise than in writing, he shall secure a written confirmation by such person of such consent or authority within three days from the date of such

contract :....."

6. Sections 16 and 17 are not relevant and we will, therefore, pass them over and go on to section 18. Section 18, sub-section (1), exacts a general exemption from the operation of the provision contained in Chapters III and IV and says that :

"Nothing contained in Chapter III or Chapter IV shall apply to non-transferable specific delivery contracts for the sale or purchase of any goods."

7. To analyse the scheme of the Act, it divides contracts of sale of goods into two categories "ready delivery contracts" and "forward contracts". Forward contracts are classified into those which are "specific delivery contracts" and those which are not. Then again "specific delivery contracts" are divided into "transferable specific delivery contracts" and "non-transferable specific delivery contracts". Section 18(1) exempts from the operation of the Act "non-transferable specific delivery contracts". The net result of these provisions is that all forward contracts except those which are non-transferable specific delivery contracts would be within the operation and mischief of section 15, sub-section (1) and (4). The main contention of the assessee, therefore, was that the impugned contracts resulting in the loss of Rs. 3,40,443 were non-transferable specific delivery contracts and they did not have to pass the test of section 15, sub-section (1) and (4). On this contention the question which falls for determination is whether the impugned contracts were non-transferable specific delivery contracts. Now there was no dispute between the parties that they were specific delivery contracts. They were between named buyers and sellers, the goods were specified as also the period during which they had to be actually delivered and their price was fixed. But the controversy was whether they were transferable or non-transferable and that is the controversy which we shall now proceed to examine.

8. It is clear from the definition contained in section 2(f) that a non-transferable specific delivery contract means a specific delivery contract, the right or liabilities under which or under any delivery order, railway receipt, bill of lading, warehouse receipt or any other document of title relating thereto are not transferable. What is, therefore, necessary to be established by the assessee in order to claim the benefit of the exemption u/s 18(1) is that the rights or liabilities under the impugned contracts were not transferable nor were the rights and liabilities under any delivery order, railway receipt, bill of lading, warehouse receipt or any other document of title relating to the impugned contract transferable. Now, at one time there was conflict of opinion amongst some of the High Courts on the question whether a specific clause prohibiting transfer must be included in the contract in order to make it a non-transferable specific delivery contract but in view of the decision of the Supreme Court in *Khardah Co. Ltd. v. Raymon and Co.*, it is now well settled that no such specific clause prohibiting transfer is necessary in the contract. It is sufficient if, on a reasonable interpretation of the contract aided by such considerations as can legitimately be taken into account,

it appears that the agreement between the parties was that the rights or liabilities under the contract or under any document of title relating thereto were not to be transferred. As observed by Venkatarama Aiyar J., speaking on behalf of the Supreme Court :

"We agree that when a contract has been reduced to writing we must look only to that writing for ascertaining the terms of the agreement between the parties but it does not follow from this that it is only what is set out expressly and in so many words in the document that can constitute a term of the contract between the parties. If on a reading of the document as a whole, it can fairly be deduced from the words actually used therein that the parties had agreed on a particular term, there is nothing in law which prevents them from setting up that term. The terms of a contract can be express or implied from what has been expressed. It is in the ultimate analysis a question of construction of the contract. And again it is well-established that in construing a contract it would be legitimate to take into account surrounding circumstances. Therefore on the question whether there was an agreement between the parties that the contract was to be non-transferable, the absence of a specific clause forbidding transfer is not conclusive. What has to be seen is whether it could be held on a reasonable interpretation of the contract, aided by such considerations as can legitimately be taken into account that the agreement of the parties was that it was not to be transferred. When once a conclusion is reached that such was the understanding of the parties, there is nothing in law which prevents effect from being given to it."

9. This is the test which must be applied for the purpose of determining whether the impugned contracts were non-transferable specific delivery contract.

10. Now the impugned contracts were in identical terms save and except for the name of the constituent and the quantity and price of the goods and it will, therefore, be sufficient if we take one of those contracts as a specimen contract and examine whether, on a reasonable interpretation of its terms in the light of the surrounding circumstances, it is possible to say that the agreement between the assessee and the constituent was that the rights and liabilities under the contract or under any document of title relating to it should not be transferred. The specimen contract we take is one at page 155 of the paper book and the observations we make in regard to that contract will apply equally to the other impugned contract. The contract was in the form of a contract note addressed by the assessee to the constituent and it started by saying "We hereby confirm having this day bought for you following", namely, "Two wagons G.N. Oil 900 tins white new tins November 1956 at 21-0-0 Line Bilty". The words used were "we.... having..... bought for you" but it was common ground between the assessee and the revenue that the assessee was a pucca adatia and the contract was entered into by him on his own account. The assessee was, therefore, a seller and the constituent a buyer under the contract. The contract then proceeded to state that the groundnut oil would be in factory tins F.O.R.

dispatching station and the cost of empty tins would be included in the cost of oil. Then followed a clause on which considerable reliance was placed on behalf of the assessee and that clause was : "Loose oil will be delivered in buyers containers when supplied by them according to the bargain condition". But this clause had obviously no application since the contract was not for supply of loose oil but was a contract for supply of 900 tins of oil. No argument could, therefore, legitimately be founded on this clause. The clause with regard to loading provided : "Wagons will be loaded in presence of your man and in absence of your man, the wagons will be loaded by our man". Then there was a clause regarding payment and it said "Hundi with railway receipt through any scheduled bank. Payment shall be made by you at Rajkot against railway receipt or hundi with relative railway receipt to be drawn on you..." The argument of the assessee based on these two clause regarding loading and payment was that they clearly showed that the agreement between the parties was that the right and liabilities under the contract (sic) should themselves carry out the contract. Now it is well settled that, as a rule, obligations under a contract cannot be assigned except with the consent of the promise, and when such consent is given, it is really a novation resulting in substitution of liabilities. On the other hand, right under a contract are assignable unless the contract is personal in its nature or the rights are incapable of assignment either under the law or under an agreement between the parties. Since it is only a benefit under the contract which can be assigned, the discussion really centers round two questions : Was the constituent entitled to assign his right to get the goods on payments of the price ? And was the assessee entitled to assign his right to receive the price on delivery of the goods ? The matter must be regarded as clear beyond doubt. The right of the assessee to receive the price was burdened with an obligation to deliver the goods and it is well-settled that a benefit under a contract which is burdened with a liability is incapable of assignment under the law. Moreover, it is clear from the clause in regard to loading that the contemplation of the parties was that the wagons should be loaded by the assessee and the price received by the assessee by drawing a hundi on the constituent and presenting it for payment to the constituent along with the railway receipt also made out in the name of the constituent. So far as the constituent is concerned, it is equally clear that he too could not assign his right to get railway receipt representing the goods unless he made payment of the price by honouring the hundi and, therefore, his right to receive the goods was burdened with an obligation to pay the price and could not be assigned under the law. The constituent could of course sell the goods represented by the railway receipt to a third party before taking delivery of the railway receipt against payment of the price and authorize the purchaser to make payment of the price and take delivery of the railway receipt from the bank, but the purchaser would have to do so in the name of the constituent and after the railway receipt is taken delivery of, it would have to be endorsed by the constituent in favour of the purchaser. This cannot by any means be called a transfer of the right to take delivery of the goods. If the right to take delivery of the goods is transferred, the transferee would be entitled in his own right to take

delivery of the goods, which he cannot in the present case, since the railway receipt would be in the name of the constituent as the consignee. We are, therefore, of the view that the rights under the contract were not transferable by either party to the contract and the contemplation of the parties was that they should themselves carry out the contract.

11. But that is not sufficient to dispose of the controversy in favour of the assessee. It is not enough that the rights or liabilities under the contract are not transferable but it is also necessary that the rights or liabilities under any delivery order, railway receipt, bill of lading, warehouse receipt or any other document of title relating to the contract must also not be transferable and it is here that the argument of the assessee runs into difficulties. The contract clearly contemplates performance by delivery of railway receipt and it is therefore necessary to see whether the rights or liabilities under the railway receipt were non-transferable. Now it is undoubtedly true that the railway receipt was required under the contract to be made out in the name of the constituent as consignee but there is nothing in the contract or the surrounding circumstances to indicate that the agreement between the parties was that the railway receipt should not be transferred by the consignee after taking delivery against payment of the price. The constituent could after taking delivery of the railway receipt from the bank transfer it to a purchaser by endorsement without committing any breach of the agreement between the parties and the rights under the railway receipt were, therefore, not non-transferable as required by the definition of "non-transferable specific delivery contract". Realising this difficulty in its way the assessee contended that the non-transferability of the railway receipt which was contemplated by the definition was non-transferability during the period prior to the discharge of the contract by performance and the definition did not require that the railway receipt should be non-transferable even after it was taken delivery of by the constituent against payment of the price and the contract was wholly carried out and performed. But this contention suffers from a double infirmity. In the first place, it fails to take into account the reason and purpose of the enactment of the exemption in favour of non-transferable specific delivery contracts. If it were permissible to the constituent to transfer the railway receipt after taking delivery of it from the bank against payment of the price, he could transfer it to a purchaser by endorsement and that purchaser could in his turn transfer it by endorsement to still another purchaser and the railway receipt could, in that event, pass from purchaser to purchaser before the goods actually arrived and were taken delivery of against the railway receipt. This would promote speculation and defeat the object and purpose for which the legislature enacted the Act. The legislature intended to grant exemption only to those contracts which were genuine contracts of purchase and sale and which were intended to be carried out by the parties giving and taking delivery of the goods and the benefit of the exemption was not intended to be made available to contracts which were not contemplated to be carried out by the parties by giving and taking delivery of goods and which were potentially capable of lending

themselves to speculation. The legislature, therefore, made it clear that a contract, in order to be non-transferable specific delivery contract entitled to the exemption, must be such that not only the rights and liabilities under it must not be transferable but also the rights and liabilities under any document of title relating to it must also not be transferable, whether during the period of the performance of the contract or thereafter, and this was done to ensure that the contract was carried out by the parties by giving and taking delivery of the goods. The contention of the assessee seeking to limit the non-transferability of the railway receipt to the period prior to the discharge of the contract by performance cannot, therefore, be accepted. Such a construction, if accepted, would require us to read into the definition at the end some such words as "before the contract is discharged by performance" or "during the currency of the contract", which are not there in the definition. What is, therefore, required to be seen is whether the railway receipt was non-transferable under the contract at all times whether during the period of the performance of the contract or thereafter and if we true to the contract it is not possible to find any indication in the present case either in the terms of the contract or in any of the surrounding circumstances which would show that the agreement between the parties was that the railway receipt should not be transferred by the constituent. This could have been easily secured by the assessee by stating in the contract that the railway receipt shall not be transferred by the constituent or by making some such provision to that effect but we do not find any such provision and it must, therefore, be held that the railway receipt relating to the contract was transferable by the constituent. If that be so, the conclusion must inevitably follow that the impugned contracts were not non-transferable specific delivery contracts within the meanings of section 2(f) and were not exempt from the operation of the provisions of Chapters III and IV u/s 18(1).

12. The assessee, however, tried to repel this conclusion by putting forward a very ingenious contention. The contention was that the bye-laws made by the Saurashtra Oil and Oil Seeds Association Ltd. (hereinafter referred to as the association) were statutory bye-laws made u/s 11 of the Act and being in the nature of subordinate legislation, they had the force of law and, therefore, bye-law 251 governed the impugned contracts entered into by the assessee with its constituents and since that bye-law provided that the clause : "This contract is a non-transferable specific delivery contract", shall away be deemed to be incorporated in delivery contracts for oil and oil seeds, the impugned contracts were non-transferable specific delivery contracts. Now it is undoubtedly true that, if bye-law 251 applies to the impugned contracts, the clause, "this contract is a non-transferable specific delivery contract", would be deemed to be incorporated in those contracts and the exemption granted in section 18(1) would apply but we do not think the contention of the assessee that this bye-laws governs the impugned contracts is well-founded. The bye-laws are undoubtedly statutory authority conferred upon it u/s 11 of the Act but that does not mean that they

are in the nature of subordinate legislation having the force of law. Since the association is recognized by the Central Government for the purpose of regulation and control of forward contracts and such regulation and control a forward contracts is intended to be achieved by providing that forward contract to be legal and valid must be entered into between members of association or through or with any such member, the association must be given statutory authority to make bye-laws for the regulation and control of forward contracts to be entered into between its members or through or with any such member and such statutory authority, is conferred by section 11 of the Act. When the association makes bye-laws in exercises of such statutory authority, the bye-laws no doubt derive their force from the section, which is the source of the statutory authority but they do not have the force of law and they cannot proprio vigore govern the incidents of the forward contracts entered into between members of the association or through or with any such member unless they are incorporated in the contracts. Moreover, it may be noticed that the recognition of an association u/s 6 of the Act is not limited to any territorial area and it is conceivable that for the same kind of goods there may be more than one association recognised for the purpose of the Act and a dealer may be a member of several such associations. If such a dealer enters into a forward contract in respect of the particular kinds of goods, the bye-laws of which association would govern such contract ? If the argument of the assessee were right, the bye-laws of all the associations having the force of law would govern such forward contract and an absurd situation would arise and neither party would know what are the right and liabilities arising under such forward contract. The bye-laws of a recognised association have no territorial operation and it is, therefore, difficult to conceive of them as having the force of law governing all forward contracts entered into between members of the association or through or with any such member. The assessee expressed an apprehension that, if we accepted the view that the bye-laws of the association do not have the force of law and that it should be open to any member of the association not to make the forward contract entered into by him subject to the bye-laws of the association, the object and purpose of the enactment of the Act would be frustrated, for, in that event, it would be impossible to regulate and control trading in forward contracts. But this apprehension is wholly unjustified, for, if any member of the association enters into a forward contract in disobedience or disregard of the bye-laws of the association, he can be proceeded against by the association in its disciplinary jurisdiction and a penalty by way of fine, suspension or expulsion can be imposed upon him. The disciplinary jurisdiction which the association has over its members is sufficient to control the activities of the members and to secure compliance with the bye-laws.

13. The object and purpose of the Act, namely, regulation and control of trading in forward contracts would not, therefore, be defeated if we deny the force of law to the bye-law. We must, therefore, reach the conclusion that bye-law 251 did not of its own force apply to the impugned contracts and the assessee would not

claim that, by reason of that bye-law, the impugned contracts were non-transferable specific delivery contracts.

14. Since on the material on record the impugned contracts could not be said to be non-transferable specific delivery contracts, no exemption in respect of those contracts could be claimed u/s 18(1). It, therefore, becomes necessary to consider whether the impugned contracts offended against the provisions of sub-section (1) and (4) of section 15. Now, it was common ground between the parties that a notification was issued by the Central Government declaring section 15, sub-section (1), to apply to groundnut oil, groundnut seeds and groundnut oil cakes in the area in which the impugned contracts were entered into by the assessee with its constituents and both sub-section (1) and (4) of section 15 were, therefore, applicable to the impugned contracts. The question is whether the impugned contracts violated the inhibition under sub-section (1) and (4) of section 15 were, therefore illegal.

15. Turning first to section 15, sub-section (1), what that sub-section provides is that every forward contract for the sale or purchase of any goods specified in the notification which is entered into in the area specified therein otherwise than between members of a recognised association or through or with any such member shall be illegal. The impugned contracts would, therefore, be illegal unless it can be shown that they were entered into between members of the association or through or with any such member. Now, the constituents with whom the impugned contracts were entered into by the assessee were admittedly non-members but the assessee was a member of the association and the impugned contracts being contracts entered into by the constituents with a member of the association were, therefore, outside the prohibition enacted in section 15, sub-section (1). The revenue could not dispute that the assessee was a member of the association but the argument of the revenue was that the impugned contracts were not entered into by the assessee in his capacity as a member of the association and they were, therefore, not free from the taint of illegality provided u/s 15, sub-section (1). This contention is not well-founded and it suffers from several infirmities. In the first place, it must be remembered that section 15, sub-section (1), is a penal section in that contravention of its prescription is made punishable u/s 20, sub-section, (1), clause (c), and it must, therefore, be strictly construed. This sub-section, on a plain natural construction of its words, does not prescribe that the forward contract, in order to escape the consequences of illegality, must be entered into with a member of the association in his capacity as such member. The only requirement is that the forward contract must be entered into with a member of the association and, therefore, so long as a party to the contract is a member of the association, the requirement of the sub-section would be satisfied. It is not permissible to us, while construing a sub-section which is punitive in effect, to read into the sub-section words which are not there. Moreover, the object and purpose of the enactment of the provision contained in section 15, sub-section (1), does not require that the forward contract must be entered into by a member of the

association in his capacity as such member. Section 15, sub-section (1), is enacted for the purpose of securing that the recognised association and through it the Central Government is in a position to regulate and control the trading in forward contracts and that is why it is provided that, if not both parties, at least one of the parties to the contract must be a member of the recognised association so that, by reason of the control exercised by the recognised association over such member, the trading in forward contracts could be regulated and controlled. The object and purpose of the statute being regulation and control of trading in forward contracts, that object and purpose is sufficiently secured by the nexus of membership of at least one of the parties to the contract. The fact of membership of a recognised association is, therefore, the only requirement prescribed by section 15, sub-section (1), and that requirement wholly serves to carry out the object and purpose of the Act. It may also be noticed that the construction contended for on behalf of the revenue would lead to this rather mischievous result that even where a non-member approaches a member of the association and enters into a forward contract with him, he might find that his contract is illegal if the member has not entered into the contract in his capacity as such member. Could it have been intended by the legislature that a forward contract entered into by a non-member with a member should be illegal merely because it is not mentioned in the contract that the member is entering into the contract in his capacity as such member ? We cannot accept the contention of the revenue that section 15, sub-section (1), requires something more than mere factum of membership of a recognised association in order to save a forward contract from the taint of illegality. The impugned contracts in the present case were entered into by the constituents with the assessee who was a member of the association and they were, therefore, not in violation of the prohibition imposed u/s 15, sub-section (1).

16. That takes us to section 15, sub-section (4), and the question is whether the assessee entered into the impugned contracts with its constituents in contravention of this sub-section. Now, for the purpose of this reference, it was common ground between the parties that the assessee had entered into the impugned contract on its own account with the constituents who were not members of the association and that it had done so without securing the consent or authority of the constituents and without disclosing in the contract notes that it had bought or sold the goods, as the case may be, on its own account. The assessee, had therefore, clearly entered into the impugned contracts in contravention of section 15, sub-section (4). Now section 20, sub-section (2), provides that any person who enters into any forward contract in contravention of the provision contained in sub-section (4) of section 15 shall, on conviction, be punishable with fine. It can, therefore, hardly be disputed that the assessed acted in breach of the provisions contained in section 15, sub-section (4), rendering itself liable to penalty u/s 20, sub-section (2), in entering into the impugned contracts with its constituents. Considerable argument took place before us on the question as to the effect of the contravention of the provisions

of section 15, sub-section (4), on the impugned contracts entered into in contravention of such provision. The revenue contended that the effect of the contravention was to render the impugned contracts illegal, whereas the assessee contended that the contravention had no invalidating consequence on the impugned contract. It is not necessary for the purpose of the present reference to decide this controversy between the parties since even if the impugned contracts be regarded as valid, there is no doubt that the assessee acted in contravention of the provision of section 15, sub-section (4), in entering into the impugned contracts and that part of the business of the assessee which consisted of the impugned contracts was carried on by the assessee unlawfully. It is not material whether the impugned contracts were illegal or legal; what is material is that the impugned contracts were entered into by the assessee unlawfully and the question which arises for consideration on this finding is whether loss of Rs. 3,40,443 sustained in the unlawful business of the impugned contracts was liable to be taken into account in computing the business income of the assessee.

17. That immediately takes us to a consideration of the second question. This question raises a point of considerable importance to the revenue and broadly stated the point is whether a loss arising in an unlawful business is liable to be taken into account in computing the business income of the assessee u/s 10 of the Income Tax Act, 1922. Now it is well-settled in England that the Income Tax Act is not restricted in its application to lawful business only. Once it is found that the transaction in question is trade, manufacture, adventure or concern in the nature of trade within the meaning of the Income Tax Act, the words of the section are not to be cut down by the consideration that the trade is tainted with illegality. The taint of illegality or wrong-doing associated with income, profits and gains is immaterial for the purpose of taxation. Even if a trade is illegal, it is still a trade within the meaning of the Income Tax Act, and its income profits and gains are chargeable with Income Tax. See Wheatcroft's Law of Income Tax, paragraph 1-411, page 1196, Simon's Income Tax, second edition, Volume 2, paragraph 480.

18. The principle was laid down by Rowlatt J. in the well known case of Mann v. Nash. The profit which was sought to be taxed in that case was profit arising from illegal use of gaming machines and it was held that this profit was chargeable with Income Tax. Rowlatt J. pointed out that the broad position taken to repel the claim of the revenue was :

".... that the Income Tax Acts when they tax the profits of any trade, adventure, manufacture or concern in the nature of trade - because those are the widest words - impliedly exclude profits of illegal trades, or to put it in another way, that an illegal trade is not a trade within the meaning of the Income Tax Acts."

and posed the question in these terms :

"That is the question... It is simply a question of the construction of the words

used : Is this a trade within the meaning of the Income Tax Acts or is it not ?"

19. The learned judge then proceeded to answer this question by saying that the trade carried on by the assessee, though illegal, was trade within the meaning of the Income Tax Act. He said :

"I myself cannot see why this letting out of the machines in a commercial way, with a view to the reception of profits in a commercial way, is not trade adventure,, manufacture or concern in the nature of trade. On the words, it clearly is. The question really is whether as a matter of construction those words are to be cut down by an overriding consideration that the trade is tainted with illegality. The great mainstay of Mr. Field's argument, quite rightly from his point of view, was the case of Duggan, decided in the Irish Free State, and that decision of the Supreme Court seems to have gone upon this principle, that no construction could be admitted which recognised that the State should come forward and seem to take a profit from what the State prohibited, because the State ought to have prevented it; and it was argued, if I may venture to say so, in a somewhat rhetorical style : Does the State keep its revenue eye open and its eye of justice closed ? I must say, I do not feel the force of that conservation at all. Would it have made any difference, I ventured to ask in the argument, if the State had kept both its eyes open and prosecuted the man for the lottery and taxed him for the profits at the same time ? That would at any rate have protected the State from the reflections which were made upon it in the words I have quoted. But, in truth, it seems to me that all that consideration is misconceived. The revenue representing the State, is merely looking at an accomplished fact. It is not condoning it; it has not taken part in it; it merely finds profits made from what appears to be a trade, and the revenue laws happen to say that the profits made from trades have to be taxed, and they say : "Give us the tax". It is not to the purpose in my judgment to say : "But the same State that you represent has said they are unlawful"; that is immaterial altogether and I do not see that there is any contact between the two propositions."

20. The same view was taken by the Court of Session, Scotland, in *Lindsay v. Commissioners of Inland Revenue*. That case arose out of a bootlegging partnership entered into between three persons for the purpose of getting whisky into the United States by committing a breach of the laws of both Great Britain and of United States and the question was whether the profits made by them were assessable to tax. The Court of Session held that the profits arising from the sales of whisky were assessable to income tax. Lord Sands observed :

"The third question is whether the profits of the adventure are exempt from income tax because their acquisition was tainted with offence against the criminal law. The tax is imposed upon profits of trade. Crime, such as house-breaking, is not trade, and therefore the proceeds are not caught by the tax. It does not follow, however, that there cannot be a business answering to the description of trade, albeit it is tainted with illegality. Trafficking in drugs, for

example, is of the nature of trade, albeit such trafficking may in the circumstances be illegal. I respectfully adopt the dictum of Lord Haldane, in delivering the judgment of the Privy Council in the case of *Smith*, that once the character of business has been ascertained as being of the nature of trade, the person who carries it on cannot found upon elements of illegality to avoid the tax."

21. Lord Morison also held that an illegal trade is a trade for the purpose of the Income Tax law and "the burglar and the swindler, who carry on trade or business for profit, are as liable to tax as an honest business man, and, in addition, they get their deserts elsewhere". Finlay J. also took the same view in *Southern (H.M. Inspector of Taxes) v. A.B. Ltd.* He also regarded the question as one of construction. He said :

"The question always is, I think, a short question of construction : is there trade.... carried on within the meaning of Case I ?" and held that once you find a trade, profession, employment or vocation, and find profits derived from that, then, at once, the tax is leviable and it would be irrelevant to the taxing statute whether the trade is lawful or unlawful. Viscount Haldane, delivering the opinion of the Privy Council, also said to the same effect while construing the Canadian income tax law in *Canadian Minister of Finance v. Smith*, where the question was whether profit made from a business of illicit traffic in liquor carried on by the tax-payer in Ontario contrary to the provisions of the Ontario Temperance Act were taxable under the Canadian income tax laws : "Construing the Dominion Act literally, the profits in question, although by the law of the particular province they are illicit, come within the words employed... There is nothing in the Act which points to any intention to curtail the statutory definition of income, and it does not appear appropriate under the circumstances to import any assumed moral or ethical standard as controlling in a case such as this the literal interpretation of the language employed..."

22. These decisions clearly show that even where a trade is illegal, it would still be a trade within the meaning of the Income Tax Act and if any profits are derived from such trade. they would be assessable to tax under the Income Tax Act. The assessee cannot be heard to say that the profits from the trade carried on by him are not assessable because the trade is illegal. To permit any such contention to prevail would be to put a premium on dishonesty. Now up to this point there was no dispute between the assessee and the revenue but at this point their argument ended. The assessee contended that if profits arising from an illegal business are assessable to tax, equally losses arising from such business should be liable to be taken into account in computing the business income of the assessee and in principle there was no distinction between profits and losses of such business. The revenue, on the other hand, urged that losses from illegal business should not be allowed to be taken into account, for to do so would be to encourage breaches of law on the part of the assessee and to permit the assessee to profit by his own wrong. The revenue invoked the principle that

no person can benefit by an unlawful act; no person can be permitted in support of his claim to put forward an act which is an unlawful act and pleaded that this principle should be projected into the Income Tax law and losses arising from unlawful acts of the assessee should not be permitted to be taken into account. We do not think the contention of the revenue is well-founded on principle and we find ourselves unable to accept it. We are of the view that illegal business is business within the meaning of the Income Tax Act and if profit from illegal business are assessable to tax, there is no reason either on principle or on authority for refusing to take into account losses from illegal business.

23. Undoubtedly, the aforesaid decisions to which we have referred were all decisions where profits made from illegal trade were sought to be taxed but the principle on which the courts held that the profits were liable to be taxed was that the illegal trade was trade within the meanings of the Income Tax Act. These decisions did not proceed upon any general principle of law that the profits from an illegal business should be taxed because not to do so would be to put a premium on dishonesty or to permit the assessee to set up his own wrong against the claim of the revenue to payment of rightful tax. This principle was, no doubt, invoked but that was for the purpose of arriving at a proper determination of the meaning of the taxing statute, namely, whether trade within it included illegal trade and it was because the courts came to the conclusion that illegal trade was included within the meanings of trade as used in the Income Tax Acts that they regarded the profits made from illegal trade as chargeable to tax. The basic rule which these decisions laid down was that the Income Tax law is not concerned with the legality or illegality of the business. Once it is found that there is a business, legal or illegal, the Income Tax law says that the profits of the business shall be chargeable to tax. Now, the word "profits" is to be understood as observed by Lord Halsbury in *Gresham Life Assurance Society v. Styles* "in its natural and proper sense - in a sense which no commercial man would misunderstand". The observations of the Privy Council in *Pondicherry Railway Co. v. Commissioner of Income Tax* and of the Supreme Court in *Badridas Daga v. Commissioner of Income Tax*, *Calcutta Co. Ltd. v. Commissioner of Income Tax* and *Commissioner of Income Tax v. Bai Shirinbai K. Kooka* show that the profits to be assessed are real profits and they must be ascertained on ordinary principles of commercial trading and commercial accounting. What are chargeable to Income Tax in respect of a business - and again we may repeat here whether legal or illegal - are the profits of the pervious year and in assessing the amount of profits of the pervious year, account must necessarily be taken of all losses incurred; otherwise we would not arrive at the true profits : vide *Commissioner of Income Tax v. Chitnavis*. The losses incurred in any particular transaction of the business must, therefore, necessarily be taken into account in order to arrive at the true profits of the business and such profits may be either positive in the sense that they are actual profits or they may be negative in the sense that they are losses. When, therefore, it is said that the profits of a business are assessable to tax, it does

not mean that the profit must represent a positive figure of excess of income over outgoing. There may instead be a loss in that the outgoings may exceed the income and in such a case that would also be liable to be taken into account in the assessment of theses. There is in principle no distinction between profits losses of a business and if the profits of an illegal business are assessable to tax, equally the losses arising from illegal business must be held to be liable taken into account in computing the income of the assessee.

24. This appears to be clear on principle but apart from principle there are two decisions of the Allahabad High Court which support the view we are taking. The first decision to which we may refer in this connection is a decision of a Division Bench of the Allahabad High Court in *In the matter of Chunnilal Kalyan Das*. The Division Bench held in this case that the profits or losses arising from wagering agreements were liable to be taken into account in the assessment for Income Tax purposes. It is no doubt true that the wagering agreements under the law of contract are merely void and no illegality is involved in entering into wagering agreements and therefore it might be suggested that this decision would not apply to a case where the business carried on by the assessee is unlawful. But it may be pointed out that the Division Bench did not base the decision on the fact that the wagering agreements were merely void but laid down a general principle application alike to illegal transactions as to void transactions and the decision, therefore, lends support to our view. The second decision of the Allahabad High Court in *Chandrika Prasad Ram Swarup v. Commissioner of Income Tax* is more in point. That was a decision given by a Full Bench of the Allahabad High Court and two of the learned judges of the Full Bench, namely, Iqbal Ahmed J. and Allsop J. dealt with the effect of illegality of the transaction on the assessability to tax. Iqbal Ahmed J. said :

"The question of the legality or illegality of transactions entered into by a firm is totally irrelevant in calculating the net profits or the loss incurred by the firm in a particular year. For example if the assessee-firm had entered into a wagering contract which resulted in huge loss, it would not have been open to the Income Tax department to decline to take that loss into account simply because the contract by way of wager was void in law. The income assessable to tax is the actual income of an individual or of a firm irrespective of the manner in which the income was derived. Legality or illegality of transaction culminating in profit or loss is, therefore, foreign to the scope of an enquiry into the income of an individual or of a firm for the purpose of taxing the same". Allsop J. also observed : "I am also inclined to agree with my brother Iqbal Ahmed that losses actually incurred must be set off against profits even if they are incurred in pursuance of activities which are illegal."

25. The revenue, on the other hand, relied on the decision of the Bombay High Court in *Commissioner of Income Tax v. Haji Aziz & Abdul Sakoor Bros*. The assessee in this case claimed to deduct u/s 10(2)(xv) a penalty of Rs. 82,000 paid by him in order to release from confiscation goods imported by him in

contravention of the provisions of a notification issued under the Import and Export Control Act and the question was whether this deduction was allowable as expenditure wholly and exclusively laid out for the purpose of the business of the assessee within the meaning of section 10(2)(xv). The claim for deduction was negatived and Chagla C.J. delivering the judgment of the court pointed out that this expenditure had become necessary because the assessee had carried out the business in a manner prohibited by law and such an expenditure could not be held to fail within the ambit of section 10(2)(xv). The learned Chief Justice observed that it was a principle underlying all laws and Income Tax was no exception that no person can benefit by an unlawful act and no person can be permitted in support of this claim to put forward an act which is an unlawful act. Strong reliance was placed on behalf of the revenue on this observation of the learned Chief Justice but we do not see how this observation can help the arguments of the revenue. It must be remembered that in the case before the Bombay High Court the claim was for a deduction u/s 10(2)(xv) and the assessee in support of his claim for deduction put forward an act which was an unlawful act. In the present case there is no claim for deduction made by the assessee u/s 10(2)(xv). The assessee does not say that particular expenditure incurred by him should be allowed as a permissible deduction. All that the assessee says to the revenue is that, "you are computing my business income and in computing such business income, you must take into account not only the profit made by me in certain transactions but also the loss incurred by me in the other transaction". There is a distinction between business expenditure and business loss. As observed by Finlay J. in *Allen v. Farquharson Brothers & Co.*, disbursement means :

"... something or other which the trade pays out; I think some sort of volition is indicated. He chooses to pay out some disbursement; it is an expense; it is something which comes out of his pocket. A loss is something different. This is not a thing which he expends or disburses. That is a thing which, so to speak, comes upon him *ab extra*."

26. But quite apart from this distinction, we do not think the observation of the learned Chief Justice in this case can have any binding effect upon us in view of the fact that this case was carried to the Supreme Court and thought the Supreme Court agreed with the ultimate decision reached by the Bombay High Court, it placed its decision upon a different ground and not upon the ground on which the learned Chief Justice had placed it. The Supreme Court took the view that the expenditure was not incidental to the business of the assessee and it did not fall upon him in his capacity as a trader. This decision of the Bombay High Court does not, therefore, help the revenue nor does the decision of the Supreme Court afford any help, for here we are not concerned with a case of penalty sought to be deducted by the assessee in computing his business income. The question here is whether the loss incurred in an illegal business is liable to be taken into account and on that question the Supreme Court decision is no authority.

27. Reliance was also placed on behalf of the revenue on the decision of the Punjab High Court in *Raj Woollen Industries v. Commissioner of Income Tax*. The assessee in this case claimed to deduct in the computation of his business income a sum of Rs. 6,800 paid by him to S.B. and Co., for entering into a device for exporting wool without having the requisite licence. The claim for deduction was rejected and the argument which prevailed with the Punjab High Court was that the amount of Rs. 6,800 was paid to achieve what was prohibited by law, namely, the export of wool without the requisite export licence and it was, therefore, not deductible. The Punjab High Court held that if an amount is spent by the assessee to carry out his business unlawful, he is not entitled to deduction of the amount as an admissible item of expenditure. The amount expended by the assessee in case was for the purpose of carrying on his business and the expenditure did fall upon him in his capacity as a trader. But, even so, the Punjab High Court took the view that, since for the purpose of claiming this deduction the assessee was relying upon an unlawful act, he was not entitled to claim the deduction. This decision is clearly distinguishable and the principle laid down in it has no application to the present case. What we pointed out while dealing with the decision of the Bombay High Court in *Haji Aziz's* case applies equally in relation to this decision. This decision was concerned with a claim for deduction of an expenditure incurred by the assessee, whereas in the present case there is no question of any claim for deduction of an expenditure. What is claimed by the assessee in the present case is that the loss incurred in the unlawful business should be taken into account in determining the business income of the assessee. But we may point out that in principle it is difficult to see why an expenditure wholly and exclusively laid out for the purpose of a lawful business should not be admissible when it is incurred for carrying out the business in an unlawful manner when an expenditure wholly and exclusively laid out for the purpose of an unlawful business is admissible in computing the profits from such illegal business. In all the English decisions referred to above, the profits of the illegal business which were sought to be taxed were the net profits after deducting the outgoings and, if that can be done, there is no reason why an expenditure incurred wholly and exclusively for the purpose of a lawful business of the assessee should not be allowable if it is incurred in carrying out the business in an unlawful manner. But we are not concerned with that question and we do to, therefore, wish to express any final or definite opinion upon it. It is sufficient to state that the decision of the Punjab High Court has no application to the case before us.

28. We are, therefore, of the view that the losses incurred in unlawful business carried on by the assessee are liable to be taken into account in computing the business income of the assessee and the loss of Rs. 3,40,443 arising to the assessee from the impugned contracts entered into unlawfully, was liable to be taken into account in determining the business income of the assessee subject to the provision of the Income Tax Act.

29. The question then arises as to what is the profit against which this loss of Rs.

3,40,443 can be set off. Now, ordinarily, if there are several businesses, the loss in one business can always be set off against the profit in another business in computing the income from business u/s 10. But the first proviso to section 24, as interpreted by the Bombay High Court in *Keshavlal Premchand v. Commissioner of Income Tax* and *Commissioner of Income Tax v. Kantilal Nathuchand*, says that if there is a loss in speculative transactions, it can be set off only against the profit from other business consisting of speculative transactions and it cannot be set off against other business income of the assessee. It, therefore, becomes necessary to consider whether the impugned contracts entered into by the assessee were speculative transactions within the meaning of the first proviso to section 24(1). Now, what is a speculative transaction is set out in the second Explanation to section 24(1) and the Explanation says that 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 of the commodity or scrip. The impugned contracts were clearly speculative transactions within the meaning of the second Explanation, since they were contracts for sale of groundnut oil, groundnut seeds and groundnut oil cakes and they were ultimately settled by cross-contracts of purchase, that is otherwise than by actual delivery of the goods. The assessee, however, contended that the second Explanation was intended to cover only those contracts where the intention of the parties from the beginning was to deal only in differences. But there is no warrant for reading the words of the second Explanation in the manner suggested on behalf of the assessee. The language of the second Explanation is plain and it does not admit of any doubt or ambiguity and all that it requires is that the contract for purchase or sale must be periodically or ultimately settled otherwise than by actual delivery of goods. It was also suggested on behalf of the assessee that in a speculative transaction the contract must be a contract for purchase and sale of goods, that is, the contract must provide both for purchase and sale and if it is merely a contract for purchase or sale, it would not be a speculative transaction. This argument was founded upon the connection "and" between the words "purchase" and "sale". But reading the second Explanation as a whole, it is clear that the word "and" is really used for the word "or". It is difficult to see how there could be a contract providing for purchase and sale of the goods at the same time and what would be the point of confining the meaning of speculative transaction to such a contract. The assessee also contended that the words "periodically..... settled" suggested that the second Explanation was intended to refer only to those contracts which passed through a clearing so that there could be periodical settlement in respect of such contract. It is undoubtedly true that the words "periodically..... settled" are intended to cover those contracts which are periodically settled through the clearing but the second Explanation does not stop with these words but it also uses the words "ultimately settled" and if, therefore, we find a contract for purchase or sale of goods which is ultimately settled otherwise than by actual delivery of the goods, it would be a speculative transaction within the meaning of

the second Explanation. It is indisputable that the impugned contracts of sale in the present case were ultimately settled by cross-contracts of purchase, that is otherwise than by actual delivery of goods and they must, therefore, be held to be speculative transactions falling within the second Explanation. The loss of Rs. 3,40,443 sustained in the impugned contracts was, therefore, liable to be set off only against the profit of Rs. 2,19,046, which was admittedly profit from speculative transactions, and the balance of Rs. 1,21,397 after such set-off was not liable to be set off against the other income of the assessee in view of the first proviso to section 24(1). We may make it clear that in taking this view we have proceeded upon the basis that the impugned contracts which resulted in the loss of Rs. 3,40,443, constituted a separate business distinct from the business of forward contracts resulting in the profit of Rs. 2,19,046. The result would however be the same even if the impugned contracts which resulted in the loss of Rs. 3,40,443 did not constitute a separate business but were part of the same business of forward contracts which resulted in the profit of Rs. 2,19,046, for in that event the loss of Rs. 3,40,443 would be liable to be taken into account in determining the profit from such business u/s 10.

30. Our answer to the question referred to us, therefore are : Question No. 1 : It is not necessary to decide whether the contracts in respect of which the loss of Rs. 3,40,443 was claimed were illegal contracts but they were entered into in contravention of the provision of section 15(4) of the Forward Contracts (Regulation) Act, 1952, and were, therefore, not validly entered into in accordance with those provisions. Question No. 2 : Even though the said contracts were not validly entered into in accordance with the provisions or section 15(4), the said loss of Rs. 3,40,443 is liable to be taken into account in computing the business income of the assessee u/s 10 and the assessee is entitled to set it off against the profit from other speculative transactions. Question No. 3 : In the affirmative. Question No. 4 : In the negative. Each party will bear and pay its own costs of the reference.