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**(1951) 05 PAT CK 0004**

**In the Patna High Court**

**Case No :** Misc. Judicial Case No. 126 of 1950

The Liquidators, Pursa Ltd.

APPELLANT

Vs

Income Tax Officer, Special Circle

RESPONDENT

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**Date of Decision :** 16-05-1951

**Acts Referred:**

Income Tax Act, 1922 — Section 10, 10(1), 10(2), 5A, 66

**Citation :** AIR 1952 Patna 106

**Hon'ble Judges :** Shearer, J; Sarjoo Prosad, J; Ramaswami, J

**Bench :** Full Bench

**Advocate :** S. Mitra, B.N. Mitter, A.K. Mitter and Mundrika Prasad Sinha, for the Appellant; S.N. Dutt, for the Respondent

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## Judgement

Shearer, J.—This is a reference made u/s 66(1) of the Indian Income Tax Act by the Income tax Appellate Tribunal, Calcutta Bench. The assessees are a company known as Pursa Limited, which was incorporated, under the Indian Companies Act in 1905 and which then acquired a property in Champaran known as the Pursa Indigo Concern. In or about 1876 the Pursa Indigo Concern had. obtained from tile Bettiah Raj a mukarrari lease of certain villages in the immediate vicinity of Pursa and it subsequently acquired rights of occupancy in various other parcels of land in the locality. Under the mukarrari lease the Bettiah Raj bad an option of repurchase but in 1905 it apparently, did not choose to exercise this option and the mukarrari lease was assigned to the assessees. The assessees constructed buildings and installed plant and machinery for the purpose of manufacturing sugar. This business was regularly carried on until 1943 when, in consequence of the disturbances which had taken place in the previous year, the company decided to wind it up and entered into negotiations with Messrs Dalmia Jain & Co. with a view to selling the sugar factory to them. Prior to this the manager of the Bettiah Raj had apparently intimated that, in his opinion, the Bettiah Raj should exercise its option to repurchase the mukarrari villages and had made certain recommendations in the matter to the Court of wards. These latter negotiations, however, eventually, fell through. Messrs

Dalmia Jain & Co. decided to purchase the whole of the rest of the property of the assesseees with the exception of their stocks of sugar, as it existed on the 9th of August, 1943, for a sum of Rs. 28,00,000/-. It appears from the correspondence that the company had hoped that the sale would be completed on or before the 30th September, 1943, which was the end of its usual accounting year. Owing, however, to the delay in correspondence between India and England it was not until the 7th of December, 1943, that a memorandum of agreement was finally entered into as between the assesseees on the one hand and Messrs Dalmia Jain & Co. on the other. The consideration money of Rs. 28,00,000/- was paid immediately and three days later Messrs Dalmia Jain & Co. took possession of the property. The assesseees had kept the factory buildings in repair and the machinery in running order but between the 30th of September, 1943 and the 10th of December, 1943, when they were actually handed over, had not used them for the purpose of manufacturing sugar. Sugar cane is not crushed throughout the year but throughout a period of four or five months which, ordinarily, begins in the latter part of November or the early part of December, appended to the memorandum of agreement was a statement to the effect that out of the purchase price of Rs. 28,00,000/- the purchaser "allocated Rs. 550,000/- to the factory land, buildings and fixed machinery and plant" and "Rs. 17,00,000/- to movable machinery and plant". The Income Tax Officer, therefore, assumed that the price actually paid for the buildings, plant and machinery used by the assesseees for the purpose of manufacturing sugar was more or less Rs. 22,00,000/-. The written-down value of this plant and machinery in the books of the assesseees as on the 30th September, 1943, was Rs. 3,17,443/-. The assesseees declined or were unable to satisfy the Income Tax officer as to what the original cost of them had been. The Income Tax officer discovered that the allowances which had been made for depreciation in previous years amounted in the aggregate to Rs. 13,05,144/- and, purporting to act under the second proviso to Clause (vii) of Sub-section (2) of Section 10 of the Indian Income Tax Act", assessed the company to Income Tax on this amount. The question that arises in the reference is whether or not the Income Tax officer and the Income Tax appellate tribunal, which confirmed his decision, misdirected themselves in law in applying this provision.

2. In order to understand the scope & effect of the proviso in the Act as it stood in 1939, which is the Act applicable in this case, it is necessary to consider Clause (vii) of Section 10 (2) as it stood prior to the amendments which were then made in it. The clause made an allowance admissible "in respect of any machinery or plant which, in consequence of its having become obsolete, has been sold or discarded." the allowance being "the amount by which the written down value of the plant or machinery exceeds the amount for which the machinery or plant is actually sold or its scrap value". In order to entitle an assessee to the allowance, it was incumbent on him to show that the machinery or plant had become obsolete, that is, that, while it may not have ceased altogether to perform its function, it was of a type which was regarded in the

particular trade or business as out of date. Although it was not made a condition, as it was in England, of an allowance being granted that the obsolete plant or machinery should have been actually replaced by a modern and up-to-date type, it is clear that the allowance was, in substance, an allowance made towards the cost of replacement. It rarely or never happens that plant or machinery can be discarded or sold without its having to be replaced. When the clause was amended in 1939, it ceased to be a condition that the machinery or plant should have become obsolete. An assessee who chose to instal machinery or plant of the most modern type and such as few, if any, of his business rivals had yet begun to use, might, therefore, become entitled to an allowance and so reduce the capital expenditure to be incurred, the whole of which, prior to 1939, would have fallen on him. Two provisos were added to the clause. One made it a condition that the amount allowed should be actually written off in the books of the assessee. The other is the proviso with which we are now concerned and which is in these terms: "Provided further that where the amount for which any such machinery or plant is sold exceeds the written-down value, the excess shall be deemed to be profits of the previous year in which the sale took place." The proviso occurs as a rider to a clause which gives an allowance for replacement and that clause has to be read in conjunction with the clause immediately preceding it which gives an allowance for depreciation. In pointing this out in "Re Shewadaya Jagannath" 58 Cal 985, Ran-kin, C. J. observed that

"both are exceptions made by the statute to the general principle that so far as the fixed capital of a business is concerned, appreciation or depreciation do not enter into the computation of profits".

3. Clauses (vi) and (vii) also occur in Sub-section (2) of Section 10 of the Act which prescribes the manner in which an account of the incomings and outgoings of a business is to be taken for the purpose of assessing income tax. The combined effect of these various provisions is that, when plant or machinery is sold for more than its written-down value, the excess is set down on one side of the account, while, on the other side of the account, is set down the allowance admissible on the rest of the plant or machinery for depreciation. The result in practice is that, in that particular year, the assessee receives a proportionately smaller depreciation allowance. Suppose, for instance, that a machine is sold for Rs. 30,000/-, the written-down value of it being Rs. 20,000/-, and suppose that the allowance admissible for depreciation is Rs. 50,000/-; Rs. 10,000/- is set down on one side of the account and Rs. 50,000/- on the other, with the result that the allowance for depreciation is, in effect, reduced from Rs. 50,000/- to Rs. 40,000/-.

4. The contention of Mr. S. Mitra, for the assessee, is that the account is only to be taken in this way when the machinery or plant sold is to be replaced or, perhaps, when it is found possible to adapt another machine to perform an additional process, which, of course, is also a case of replacement. Mr. Mitra, it is true, did not put it in quite that way what he said was that the proviso applied

only in the case of a business which had continued throughout the year of assessment and into the succeeding year and did not "apply to a business which had been discontinued or was in the process of being discontinued, it being immaterial that the business of selling goods already manufactured continued, if the business of manufacturing goods had been stopped. That, however, is merely another way of stating the point Mr. S. N. Datta, for the Department, on the other hand, contended that the proviso applied whenever a sale took place, whether the plant or machinery sold was replaced or intended to be replaced or not. Assuming for the moment and for the sake of argument, that two constructions are possible, I would adopt the method of interpretation laid down by Lord Salvesen in "Scottish Shire Line, Ltd. v. Lethem" 1912 6 Tax Cas 91It was there said;

"Even in a taxing statute it is legitimate to consider which of two possible constructions is most in accordance with the spirit and intention of the Act".

Machinery and plant wear out or become obsolete and have to be replaced, and every prudent businessman sets aside out of his annual profits a certain sum against the day when replacement becomes necessary. It is in order to enable him to do so that an allowance is given for depreciation. The intention of the Legislature both prior to and since 1939 was that he should be in a position to expend on the purchase of plant or machinery to replace plant or machinery which had worn out or become obsolete at least as much as he had expended originally on the discarded plant or machinery. If the sale proceeds are less than the written-down value, he can not do this, and so an allowance is given under Clause (vii). Until 1939, if the sale proceeds exceeded the written-down value, the assessee retained the balance and so was able in that particular year to lay aside more than his depreciation allowance. In the view taken by Mr. Mitra, it was in order to prevent this that in 1939 the Income Tax Act was amended.

5. It is understandable why it should have been amended in this way then. As it was to cease to be a condition of granting a replacement allowance that plant or machinery discarded or sold<sup>1</sup> should be either worn out or obsolete, claims for such an allowance would become more numerous, while, owing to the general rise in prices, plant or machinery would more often, be sold for more than its written-down value. Also, it is, I think, at least possible that there was a lacuna in the Act and it was open to an assessee to discard plant or machinery in one year and obtain an allowance based on its scrap value and then, in the succeeding year, sell it for considerably more and appropriate the whole of the sale proceeds. However that may be, it is understandable that the Legislature should in 1939 have altered the Act so as, in effect, to reduce the depreciation allowance admissible to an assessee. It may be observed that when the sale proceeds exceed the written down value, the revenue authorities in England<sup>1</sup> appear to have resorted to somewhat similar devices to raise a kind of counter-balancing charge against the assessee. There the replacement allowance admissible on other machinery or plant sold subsequently for less than its written

down value has sometimes been reduced and, alternatively, depreciation allowance has sometimes not been given on the full cost of the new machinery or plant, but on its cost as proportionately reduced (see Income Tax Law and practice by Newport and Staples, 11th edition, page 119). In this view of the matter, although the sale proceeds of a capital asset appear in the account taken for the purpose of computing income tax, the tax is still tax on income and not a tax on capital. All that can be said is, to adopt the language of Rankin, C. J., that depreciation or appreciation enters into the computation of profits more than hitherto. In the view contended for by the Department, on the other hand, the tax is not wholly a tax on income, but in part a levy on capital. In this particular case the assessee did not use their machinery and plant during the year of assessment and no depreciation allowance was at all admissible (vide (1937) 5 ITR 734 . I do not myself attach any great importance to this. It would not, " I think, have made any difference if the machinery and plant had been used and a proportionate allowance for depreciation had been admissible. The reason why depreciation allowance is granted may be, as I have said, to enable the assessee to lay aside part of his profits to cover the cost of replacement, but in theory it is an expense incurred by him in earning his profits, and he is entitled to it even if he has closed down or decided to close down his business.

6. Mr. Datta's argument is that, whenever the sale proceeds exceed the written-down value, it necessarily follows that, in the past, the assessee has received too much in the shape of allowances for depreciation, and it is, therefore, only fair that he should refund the excess. Now, the amount of the allowance is fixed by law and it seems to me impossible to say that in any particular year the assessee has received either too much or too little. Also, there is not a word anywhere to suggest that previous assessments are, as it were, to be reopened or any amount is to be refunded.

7. Considerations as to what is "fair" or "equitable" are out of place in construing a taxing statute, but I cannot agree with Mr. Datta that it is "fair" that the assessee should be made to "refund" the excess of the sale proceeds over the written-down value. They may have received much more for their machinery and plant than they could ever have anticipated some years ago, but, on the other hand, as the general level of prices has risen, they will also have to pay much more for anything they may wish to purchase with the money they have got for it. To say that the assessee made a profit out of their transaction with Messrs Dalmia Jain and Company is, I think, to use language some what loosely. Even, however, if they had made a profit in the sense that they realised more at the sale than they themselves originally paid, they would have been entitled to retain the whole of it. It was not a profit arising out of their business. It had nothing to do with the business. It arose out of quite other and fortuitous circumstances, such as the rise in prices due to the war in scarcity of sugar in India, due again to the war; and to the consequent readiness of Indian financiers and capitalists to embark on the business of manufacturing sugar. The owner of a sugar factory who, owing to the existence of a state of war, can sell his plant or machinery for

more than he paid for it is in exactly, the same position as the owner of a picture who bought it when the artist was a young man unknown to the public and who can sell it years afterwards, when the artist has made his reputation, at a very considerable profit. There has been in each case an accretion to the value of a capital asset and until 1946 the owner was entitled to retain the whole of the resulting benefit. When I pointed out to Mr. Datta that it was not until 1946 that Section 12B was inserted in the Income Tax Act and capital gains were made assessable to Income Tax, Mr. Datta could only say that Section 12B applied to property of every kind and not merely to plant and machinery. I can not persuade myself that, if it was in 1939 and not until 1946 that the Legislature decided to make so striking a departure from its hitherto well-settled fiscal policy, it would have chosen to do so by inserting what is, at most no more than an ambiguous proviso in a clause dealing with an allowance for replacements. Applying the test laid down by Lord Aalvesen, it appears to me that there is every thing to be said for the more restricted, and nothing to be said for the more extended meaning sought to be given to the proviso.

8. Is there, however, any real or serious ambiguity in the language used by the Legislature? Too much weight cannot be attached to the words "shall be deemed to be profits of the previous year", nor can the proviso, in which these words appear, be more or less completely divorced from its context. The words "any such" machinery or plant in the proviso refer back to the words "in respect of any machinery or plant" which occur at the beginning of Clause (vii). The word "any" means, I think, a particular item or items of machinery or plant and does not mean, or certainly cannot very easily mean, the entire aggregate of plant and machinery. The word "sold" occurs in conjunction with the word "discarded" and while the latter word is entirely appropriate in the case of a continuing business, it is altogether inappropriate in the case of a business which has been closed, down or is in the process of being closed down. The first of the two provisos to Clause (vii) can only apply to a continuing business. Is there any reason not to assume that the second proviso was also intended to apply only to such a business? Finally, the proviso appears in a clause giving an allowance for replacement. That alone suggests that its operation was intended to be confined to cases in which, if the sale proceeds had been less than the written-down value, the assessee would have been entitled to claim an allowance for replacement. For these various reasons the Income Tax Appellate Tribunal, in my opinion, misdirected itself in law as to the scope and effect of the second proviso to Clause (vii) in Section 10 (2) of the Indian Income Tax Act. I would, therefore, answer the first of the two questions referred to us by saying that the sum of Rs. 13,05,144/- is not liable to be taken into account in assessing Income Tax on Parsa Limited during the year of assessment.

9. The second of the two questions which have been referred to us is stated thus: "Was the profit of Rs. 15,882/- on the sale of stores of the factory taxable under the Income Tax Act in the circumstances of this case?" This sum of Rs. 15,882/- represents the difference between Rs. 88,000/- which the Income Tax

Officer described as " "sale proceeds on basis of expert valuation" and Rs. 72,118/-, which admittedly was the cost of certain stores to the assessee. The use of such an expression as "on basis of expert valuation", without indicating who the expert was, is to be deprecated, especially as it may have the effect of stating (sic) the assessee out of Court. The Income Tax Appellate Tribunal has, however, made it clear that what the Income Tax Officer really relied on was the stores account opened in the books of Messrs. Dalmia Jain and Company, which showed that that company or some officer of that company had valued these stores at Rs. 88,000/-. Neither the Income Tax Officer nor the Appellate Tribunal has, in dealing with this matter, referred to the memorandum of agreement. Paragraphs 15 and 16 of the agreement make it quite clear that, so far as any stores ordered or received by the assessee after the 9th August, 1943, were concerned, Messrs. Dalmia Jain & Co., were to pay nothing more than the cost price and, in consequence, on these stores at least the assessee made no profit at all. It is not very clear whether the stores with which we are now concerned are stores which did not at all come within the purview of paragraphs 15 and 16 of the memorandum but stores which came wholly within the purview of Clause (c) of paragraph 19. That paragraph as I have already said, contained a statement by the purchasers as to how they proposed to allocate the total consideration money Rs. 28,00,000/- between certain specific items. It is quite clear that this statement was made in order to enable the vendees to claim certain allowances, and, in particular, allowances for depreciation when they came to be assessed to Income Tax. Moreover, it does not show how much was allocated to the stores. The stores are lumped along with other property and to the whole Rs. 2,50,000/- is allocated. Is it reasonable or in law possible to infer from the circumstance that the vendees, for the purpose, presumably, of preparing their balance-sheet under the Companies Act, valued the stores at Rs. 88,000/- and the circumstance that the vendors paid Rs. 72,118/- for them that the vendors made a profit of Rs. 15,882/ ? We do not know how the valuation was made whether on the basis of the list-prices of the firms which supplied them originally or on some other basis. Apart from this, the profit, if any, made out of the sale of these stores was clearly, not a profit made out of the business carried on during the year. It was a capital gain and, in view of the definition of capital asset which excludes stores, it would not even be taxable u/s 12-B if Section 12-B applied to a profit made in 1943. I would, therefore, answer the second question also in the negative. The assessee is entitled to their costs.

Sarjoo Prosad, J.

10. This is a reference made to us u/s 66 (1) of the Income Tax Act by the Income Tax Appellate Tribunal, Calcutta Bench. The questions of law arising out of the order of the Tribunal which have been formulated for our consideration are the following:

"(1) On the facts and in the circumstances of this case is the surplus of Rs. 13,05,144/- arising out of the sale of plant and machinery of the sugar factory

chargeable u/s 10 (2) (vii)? And

(2) was the profit of Rs. 15,882/- on the sale of stores of the factory taxable under the Income Tax Act in the circumstances of this case?" It appears that on behalf of the assessee there were a number of points, as many as seven, suggested for reference to this Court, but the Tribunal did not see its way to accept the suggestion of the applicant, and there is no application before us made on behalf of the assessee u/s 66 (2) of the Act against the order of the Tribunal refusing to refer the points in question. Our decision, therefore, will have to be confined to the points on which the reference has been made, and having regard to the limited jurisdiction which this Court exercises in case of a reference u/s 66 of the Indian Income Tax Act (Act XI of 1922 as amended up-to-date).

It is not open to us to travel beyond the points which have been referred to us by the Tribunal and to take into consideration some of the other points raised by the assessee.

11. The facts leading to this reference may be stated as follows: The assessee is "The Pursa Limited", a joint stock company which carried on business in growing, manufacturing and seeing sugar. The assessee Company is incorporated in India under the Indian Companies Act but the share-holders and directors reside in the United Kingdom and the meetings are held there directing the affairs and management of the Company. It went into voluntary liquidation on the 20th of June, 1945, and it is at present represented by the liquidators who are the applicants before this Court. The year of assessment is 1945-46 and the accounting year runs between the 1st of October 1943 and the 30th of September 1944. The assessee sold its sugar factory and zirat lands appertaining, thereto to Messrs. Dalmia Jain and Company for a sum of rupees twenty-eight lakhs during the year of accounting. The sale took place by virtue of a memorandum of agreement dated the 7th of December 1943. It is admitted that the factory did no crushing of sugar during the year in question but confined its activities to the disposal of the sugar factory and the stock of sugar that was not taken over by the vendee. It also appears to-be undisputed that the manufacturing process in the factory in question generally commenced from the month of December and went on till following April. The facts show that during the accounting year and before the crushing season started, the company had made up its mind and commenced negotiations for the sale of the factory and other assets appertaining thereto with the ultimate object of winding up the business. The negotiations culminated in an agreement for sale entered into between the parties on the 7th of December 1943, between the assessee, on the one hand, and Messrs. Dalmia Jain and Company, Limited, on the other. This memorandum of agreement, inter alia, provided that the vendor was to sell and demise to the purchaser for a total price of rupees twenty-eight lakhs all the lands, buildings and machineries mentioned in the agreement in addition to stocks and stores as they existed on the 9th of August, 1943 (subject to the subsequent consumption of the stocks and stores in the ordinary course of

business.) The stocks of manufactured sugar and of grain lying in the godown and existing on the 9th of August 1943, were expressly excluded and remained the property of the Company. The possession of the assets covered by the memorandum in question was to be delivered to the purchaser after the execution of the agreement and after the payment of the purchase price; and even after the possession of the assets had been delivered and up to one year from that date the company retained the right to occupy the manager's bungalow, and of the godown in order to enable the company to dispose of the stock in trade and other capital assets not covered by the sale. It may be noted that the title to or possession over the property was not to pass until the execution of the memorandum of agreement and the payment of the purchase money of rupees twenty-eight lakhs by the vendee. The said memorandum of agreement further provided that the purchaser was to pay to the vendee certain additional sums of money on account of the advances made by the vendor to cane-growers for the season 1943-44 in respect of which cane had not been supplied till then, in respect of zarpeshgi loans advanced by the vendor to such cane-growers, as also in respect of stores and other articles ordered by the vendor for the purposes of the factory and received since the 9th of August 1943.

12. The assessee in effecting the sale of the buildings, plants and machineries, etc., as also the stores as stated above made certain profits which form the subject-matter of the questions under reference. After the sale of the plants and machineries the assessee disposed of its stock of sugar not sold to the vendee, and then it went into liquidation.

13. Evidently in submitting its return the assessee claimed certain deductions in respect of the business carried on by the company during the year of accounting. The Income Tax Officer thought that the deductions claimed were not admissible and wrote to the company on the 21st of February 1947, to show cause why the activities of the company during the accounting year should not be taken as tantamount to realisation of assets on liquidation and not to carrying on of any business. The liquidators in their reply dated the 19th of March 1947, refused to accept the position that the activities of the company during the accounting year were merely confined to realisation of assets and not to the carrying on of business. The relevant portion of the letter runs as follows:

"(1) The company went into liquidation on 20th June, 1945. (2) In view of the date of the liquidation of the company we cannot agree that the company was not carrying on business during the year ended 30th September 1944. In addition, the various debits contained in the Sugar Factory accounts are those incurred in carrying on the Company's business."

14. The liquidators accordingly pressed for the deductions which they had claimed in their return. It was, therefore, not disputed by the liquidators before the Income Tax Officer that the sale of the buildings, plant, and machinery took place during the accounting year at a time when the business of the factory was still being carried on by the assessee. On receipt of his letter the Income Tax

Officer on May 17, 1947, informed the liquidators that the profits made by the company on the sale of their buildings, plant and machinery were taxable under the second proviso to Section 10 (2) (vii) of the Income Tax Act, and he called upon them to furnish certain informations in regard to the sale price of the machinery and plant and the original cost to the company for the same, as mentioned in his letter dated the 17th of May 1947. These particulars, however, were not furnished by the assessee and the Income Tax Officer having found that the sale took place during the continuance of the business of the company, long before it went into liquidation, held that the profits on the sale of plant and machinery as also on the value of stores were liable to assessment u/s 10 (2) (vii) of the Income Tax Act. He accordingly by his order dated the 21st of June, 1947, added a sum of Rs. 13,05,144/- on account of the profits on the sale of plant and machinery, etc., and Rs. 15,882/- on account of profits on sale of stores as already stated. The whole dispute, therefore, centres round these two items of assessment. In assessing the amounts of profits on the sale of plants and machinery, the Income Tax Officer had to rely upon previous assessments and depreciation records as the assessee had failed to furnish the particulars required; whereas in respect of the stores the Income Tax Officer found that in the sale-deed no details were available, the price indicated being a lump amount for the entire property sold. He nevertheless proceeded to assess the profits as he says on expert advice. This assessment was affirmed on appeal by the Appellate Assistant Commissioner of Income Tax under his order dated the 31st of January 1948. The actual hearing of the case, it appears, took place on the 20th of August 1947, and Mr. S. Mitra on behalf of the assessee complains that, in view of the delay in delivering judgment, the Appellate Assistant Commissioner did not give full weight, to the arguments placed before him. The Assistant Commissioner also concedes that in the year under assessment there was no manufacture of sugar by the company because of the negotiations which started from August 1943, and culminated in the memorandum of agreement in December 1943, and that there was only sale of sugar during the period in question. He, however, also agreed with the Income Tax Officer in his view that the sale of sugar by the Company amounted to carrying on business, and that as the plant and machinery were sold during the continuance of the business, the business not having been closed at any stage, it must be assumed that Section 10 (2) (vii) applied to the case, and, as such, the profits made by the company were liable to assessment. He observed as follows:

"But in this case although the entire block of plant and machinery was sold to Dalmia Jain & Co., Ltd., the entire business was not transferred to the said party and the business was not closed so that it was being carried on as contemplated by Section 10 (1) of the Income Tax Act. There was one organisation, single control, same set of accounts, same capital and same staff employed for the three kinds of activities referred to above (namely growing sugarcane, manufacturing sugar and selling sugar). They were interwoven and inter-twined and were not separable. Even though the first two kinds of activities were absent

in the year under assessment the selling activities were carried on and the Company in winding up its affairs still carried on business. It would have been quite a different proposition if the entire business as a going concern was transferred to Dalmia Jain and Company, Limited. But that was not done and only 3 portion of the activities were discontinued Therefore I support the I. T. O.'s view that the sale of the entire block of machinery was done in the course of the carrying on of the assessee business."

15. The matter was then taken in appeal by the assessee before the Appellate Income Tax Tribunal. Before the Appellate Tribunal the assessee did not dispute the correctness of the figure as to the amount of profit in respect of the sale of machinery and buildings. But his contention was that Section 10 (2) (vii) had no application to the case, and he also disclaimed the correctness of the statement of the liquidators contained in their letter dated the 19th of March 1947, which I have already quoted above. The assessee urged that before the profits could be assessed u/s 10 (2) (vii) it had to be established that the sale was made in the course of the carrying on of the company's business. In the present case, according to the assessee, the sale had been effected in the process of winding up the affairs of the company and realisation of its assets. In support of this contention, the assessee produced before the Tribunal some minutes of the Board of Directors meetings held in England and also referred to the correspondence between the company's employees in India and the Board of Directors in England. The contention of the assessee was, however, not entertained by the Tribunal. The Tribunal found that the sale of sugar continued up to June 1944, and the appellant company spent substantial amount of money in the way of establishment and general charges even subsequent to the sale of the machinery. These activities of the assessee amounted to carrying on the company's business as contemplated by Section 10 (1) of the Act. In addition to the above, the Tribunal observed as follows:

"Besides the question of the company's activities subsequent to the sale on 7-12-1943 it was admitted by learned counsel for the appellant that up to that date of the sale the company's business went on normally, it was at no stage claimed before us that there was discontinuance of the business previous to the sale itself. The only contention raised before us was that as the sale en-bloc brought about cessation of the company's business it must be held that the sale itself was not in the course of carrying of the company's business. We are afraid we cannot subscribe to this view of the learned Counsel. There was no break between the company's carrying on business and the sale of the assets The sale of the assets must therefore be taken as having been done as a part of the carrying on of the company's business and as such the profit on the sale of machinery en bloc has been rightly assessed u/s 10 (2), (vii)."

16. In regard to the sum of Rs. 15,882/- the profits on the sale of stores, the assessee contended that the figure was an imaginary figure and had been arrived at by the Income Tax Officer without any data. It was contended that the sale-

deed showed a lump amount of sale price. It was, therefore, impossible to allocate any particular portion of it as having been intended solely in consideration of the sale of stores. The Tribunal, however, referred to certain entries in the books of the vendee in order to determine the appropriation of the sale proceeds towards the sale of the stores. They say that this was the method adopted by the Income Tax Officer though the order of the Income Tax Officer does not actually say so. On the contrary, it purports to depend upon some expert advice in the matter. On the basis aforesaid the Tribunal held that the sum of Rs. 15,882/- by way of profits on this account had been correctly determined by the Income Tax Officer. One should have thought that this portion of the Tribunal's order was quite clearly wrong, the decision of the Income Tax Officer proceeds on the basis of some expert advice and not upon any supposed appropriation in the books of the vendee. But even if that were so, it is difficult to understand how this could be utilised against the vendor unless it was by some agreement between the parties that the amount had been so allocated. In any case as I shall show later, this consideration is not open to us now and we have to decide on the footing as if this figure of Rs. 15,882/- was a correct figure.

17. The order of reference does not indicate all the facts which I have mentioned above, but they are self-evident from the various orders of the taxing department and are not disputed before us. We have now, therefore, to answer the points referred to us in the light of the facts as found by the Tribunal. I have quoted above the relevant findings in some detail. The answer to the questions formulated by the Tribunal depends upon the answer to the question whether the profits in respect of the sale of the buildings plant and machinery as also in respect of the stores were earned in course of the business of the company; in other words, if the business of the company continued up to the date of the sale or even after the date of the sale during the accounting year, then it is not disputed that the profits would be chargeable to tax under the second proviso to Section 10 (2), (vii) of the Income Tax Act. On this point the findings of the Tribunal appear to be quite specific, and it is not easy for me to comprehend how on that finding the Tribunal could make a reference u/s 66 (1) of the Act to this Court. On the finding as it stands the question is purely a question of fact, and if there is any evidence to support the finding of the Tribunal on the point, it is impossible for us to interfere with such a finding on this reference,

18. Mr. S. Mitra, the learned Counsel for the applicants, who has presented the case on their behalf with remarkable learning and lucidity, has urged that the finding in question has not the sanctity of a finding of fact at all; and indeed, he points out that the members of the Tribunal themselves do not attach that sanctity to it. He argues that the question whether trade or business was being carried on during the accounting year is a mixed question of fact and law inasmuch as the inference based upon the primary facts as to whether they amounted to carrying on business was really an inference of law and not an inference of fact. He also contends that even assuming that the question was one of fact, yet the finding in this case could not be sustained as there was no legal

evidence to support it. In " this connection he points out that the circumstances on which reliance has been placed by the Tribunal to come to that finding are also consistent with the case of the assessee that it was not the business which was carried on, but that all that was being done was to realise the assets of the company as in a case of winding up. The learned Counsel also argues that in any case certain very important materials which should have been taken into account by the Tribunal in forming their conclusion and in arriving at the finding were altogether ignored by them. Those materials, r the learned Counsel submits, were an affidavit filed by one Robert Adam Brown, a chartered accountant by profession and a partner in the firm of Lovelock & Lewes, and also one of the liquidators of the assessee company, and the other materials were the correspondence which took place between the Board of Directors in England and the employees of the company in India. In addition to these, there was a letter of Commander, N. W. Dixon, (R.N.) Ex-Chairman and Managing Director of the company (Pursa Ltd.) in reply to the enquiry made by Messrs. Lovelock and Lewes the liquidators of the assessee company in respect of certain matters connected with the business of the company during the period of accounting. The learned Counsel points out that the materials aforesaid which, although at one place have been referred to by the Tribunal, have not been considered by them in so far as they had a bearing on the point involved. In support of his contentions the learned Counsel has referred to a largo number of English and Indian decisions. Before I examine the arguments synthesised above, I should refer to some of the relevant provisions of the Indian Income Tax Act.

19. Section 6 of the Act enumerates various heads of income chargeable to Income Tax. One of them is Item No. (iv) in the Section which relates to "Profits and gains of business, profession or vocation." The term "business has been defined in Section 2 (4) of the Act and it "includes any trade, commerce, or manufacture or any adventure or concern in the nature of trade, commerce or manufacture." Therefore, profits and gains out of any trade, commerce or manufacture or any such adventure or concern are liable to be assessed as income. Now, Section 10 of the Act is the Section which deals specifically with income arising from business which is chargeable to Income Tax. Under Sub-section (1) of the section it is provided that the tax shall be payable by an assessee under the head "Profits and gains of business, profession or vocation" in respect of the profit or gains of any business, profession or vocation carried on by him. Sub-section (2) of the Section provides for certain deductions which are admissible in respect of the profits or gains of such a business, and some of the clauses show that the assessee is entitled to claim a deduction an respect of the buildings, machinery plant, etc., used for the purposes of the business. Clause (iv), for instance, provides for deduction on account of the insurance premium paid for ensuring buildings, plant, machinery, etc., against risk of damage or destruction. In Clause (v) deduction is permissible in respect of current repairs to such buildings, machinery, plant or furniture, and in Clause (vi) in respect of depreciation of such buildings, machinery, plant or furniture. Therefore, so long

as the business is being carried on, these deductions are permissible to the assessee. Now, in Clause (vii), similarly it is provided that the assessee can claim deductions in respect of any such building, machinery or plant which has been sold or discarded or demolished or destroyed. This clause is subject to a very important proviso and that proviso shows that where the amount for which any such building, machinery or plant is sold exceeds the written down value, so much of the excess as does not exceed the difference between the original cost and the written down value shall be deemed to be profits of the previous year in which the sale took place; in other words, by virtue of this proviso, the excess amount over the written down value but not exceeding difference between the original cost and the written down value shall be added to the profits of the business, and, therefore, shall be liable to assessment. In fact the Act by introducing Sub-section (6-C) in Section 2 which is the definition Section has provided that such a profit shall be included in the term "income", and would, therefore, be assessable as such being the profits of the business. There was some argument addressed to us on the question as to which are the charging sections of the Act. Indeed, the argument is absolutely immaterial for the purposes of the point under enquiry. It is conceded on both sides that if the building, plant and machinery etc., had been sold after the business had been closed down, then any profits earned by the company on account of such sale would not be liable to assessment as it would not relate to the profits or gains of the business, the business having already come to an end. But where the business continues to be carried on and during the continuance of such a business the plants and machineries are sold and profits deprived, the second proviso to Clause (vii) of Sub-section (2) of Section 10 is bound to come into play. The whole question, therefore, as I have said, turns upon this fact whether the business did continue.

20. In this connection some of the salient facts may be recalled. The accounting year commenced in October 1943. The sale was agreed to in a general meeting of the company on the 8th of October 1943, but the memorandum of sale was actually executed and the purchase money paid on the 8th of December 1943, and the concern was turned over to the purchaser, Dalmia Jain & Co., on the 10th of December 1943. Prior to that, there is absolutely nothing to indicate that the company had stopped its business. We have been persuaded by the learned Counsel for the applicant to peruse the correspondence, the affidavits, and the letter of Commander Dixqn, 1 and I do not find anything anywhere to indicate that the company actually had stopped its business. There is no resolution of the Board of Directors or of the general body of share-Holders directing cessation of business. These materials, on the contrary, show that although the intention was to dispose of the entire concern, yet the share-holders or directors never wanted, that the business of the company should stop until, at any rate, the sale was effected. In fact, it is admitted by Commander Dixon himself that the trading and manufacturing had to be carried on until such time as any sale was completed. The directors realised that they had various difficulties in bringing to fruition the

sale of the entire concern. They had to dispose of certain zirat lands which were presumably utilised for the purpose of growing cane for the factory. They had also to negotiate with the Bettiah Raj for the repurchase of the mukarrari interest which were holding under the Raj and which under some contract they were liable to sell to the Raj alone: They had also to sell the stock of sugar and grains and to provide for making other arrangements in order to complete the disposal of their assets. These things naturally required time and as they depended upon uncertain factors, as prudent businessmen, the directors never intended to stop the business altogether, nor did they actually stop it. Commander Dixon says in his letter that: "we were advised that the share-holders should not be asked to agree to the actual winding up until the property sold to Dalmia Jain & Co. had actually been conveyed to them." and then he proceeds to say:

"Delays and difficulties arose over proving title and it was not until April, 1945, that we were informed by our Solicitors that this business had been satisfactorily completed."

and then a general meeting of the share-holders decided on the 20th of June 1945, that Pursa Ltd., the assessee company, should be wound up forthwith.

21. The affidavit of Robert Adam Brown is very much to the same effect. He says that for the purpose of manufacturing sugar the company grew a certain amount of sugar cane on its own lands and purchased further supplies of cane, and when the land on which the company grew sugar cane was sold as part and parcel of the Pursa Sugar Factory in accordance with the agreement dated the 7th December 1947, the company thereafter grew no more sugar cane, and did not buy any sugar cane. The affidavit also shows that between the 9th August 1943, and 7th December 1943, certain stores were also consumed in the normal course of the company's business. These facts very clearly indicate that up till the date of sale the company did carry on its normal business and there was no cessation of business till then. It is true that there was no crushing of sugarcane during the period; but the crushing season, as I have said, did not start until the month of December. Having regard to these facts, it was not surprising that the liquidators claimed certain deductions on account of the carrying on of business during the year of accounting, and when the Income Tax Officer did not consider that the deductions were admissible, they in their letter dated the 19th of March 1947, asserted that the company was carrying on business during the year ending 30th September 1944. This assertion of theirs they said, was further supported by the fact that there were various debits contained in the sugar factory accounts showing expenses incurred in carrying on the company's business.

22. The learned Counsel for the assessee very strongly urged that this statement of the liquidators was based on a misapprehension of the legal position. I have shown this was not actually so. It was an admission on a point of fact and an admission which is also borne out by the materials placed before us. The learned Counsel also suggested that the admission, if at all, referred to the state of affairs up to the 9th of August 1943 only, which was very much prior to the

accounting period. He says emphasis upon a term of the memorandum of agreement where it is provided that the buildings, plants, machineries, etc., were to be sold as on the 9th day of August, 1943. Now it is quite obvious that this term only means that they were to be sold as they existed on that date. In fact, Robert Adam Brown in his affidavit explains the position. He says that the sale agreement dated the 7th December, 1943, provided that the company will sell the various items enumerated in the agreement including stores, articles and things as on the 9th day of August, 1943, (subject to subsequent use and consumption in the ordinary course of business) and a "list" of stores as at the 9th August 1943, was appended to the agreement. It is, therefore, quite obvious that this date 9th of August, 1943, had nothing to do with the title to the property or to the possession of the property. It was only concerned with the various things and appurtenances of the factory and the plants and machineries, etc., as they were found on the premises on that date a list of which was appended to the agreement. The agreement itself shows that the purchaser was not entitled to take possession until the consideration money had been paid. In fact, the Board of Directors also were particularly cautious about the payment of the purchase money. In their resolution dated the 20th of August 1943, when they accepted the offer of Dalmia Jain & Co., they sent definite instructions to their joint manager Mr. J. F. Owen, that payment of purchase price must be safeguarded before the concern is turned over to the vendee. There could be, therefore, no intention to make the title vest as from the 9th of August 1943, and, in my opinion, the contention of the learned Counsel is negatived by the very materials which he has placed before us. It is further pointed out by the learned Counsel that the stores consumed by the factory were also negligible and the intention merely was to keep the factory going so that the machinery might not deteriorate. Even this contention does not appear to be well-founded as the affidavit of Adam Brown shows that the consumption was in the ordinary course of business. In any event, obviously there could not have been much consumption because the sale had been already effected on the 8th of December, 1943, almost when the crushing season had just started. These are, however, entirely questions of fact. The liquidators themselves stated that the business of the company was being carried on and the Tribunal was justified in relying upon this statement. They were right in pointing out that at no stage it was claimed before them that there was discontinuance of the business previous to the sale itself, and in fact there was no break between the company's carrying on business and the sale of the assets.

23. The other phase of the question relates to the sale of the stock of sugar and grains. It is to be noticed that this stock of sugar was not intended to be sold along with the plants and machineries. In explaining the position to Messrs. Lovelock & Lewes, Commander Dixon says that the sugar stocks and grains were purposely excluded as it could not be known at what date such a sale would be concluded and the quantity of both these items and also their market prices were bound to fluctuate from day to day. Robert Adam Brown's affidavit is to the

same effect and so is the recital in the memorandum of agreement. Adam Brown says that in the negotiation for the sale of assets the sugar stocks and grains were purposely excluded, inasmuch as they could not foresee when the sale of the assets would be actually concluded, and the market price of sugar as also the quantity of sugar and grains varied from day to day. Evidently the factory was, therefore, not anxious to dispose of the stock of sugar at any cost, but to sell it at its convenience presumably at an advantageous price after the sale of the assets, namely, buildings, plants" and machineries, etc., had been completed. The learned Counsel urges that the vendee, Dalmia Jain & Co., had refused to purchase the stock of sugar and contracts for the sale of sugar may have been entered into by their selling agents; and, therefore, they were prevented from disposing of the sugar according to their own pleasure. The affidavit of Adam Brown, does not give the exact quantity of sugar in stock on the 7th of December, 1943, but it only shows that the stock in hand at the close of the company's accounting year 30th of September 1943, amounted to 52,860 maunds. The members of the Tribunal have stated in their order that the sugar stock on the 30th of September, 1943, according to the balance-sheet, amounted to over six lakhs of rupees which were sold during the following year for Rs. 7,50,000; and they inferred from the various materials that the activities of the appellant company in disposing of their sugar stock, subsequent to the sale of the factory amounted to carrying on the business of the company during the accounting period. It is true that the vendee was not prepared to accept the stock of sugar, but in my opinion, there was nothing to prevent the assessee from disposing of this stock of sugar at the earliest opportunity, it is also true that under the terms of selling agency the negotiation for the sale of sugar was to take place through the selling agents. Under paragraph 16 of the terms of that agreement the company was entitled to make direct sales of sugar up to 5,000 maunds normally over which the selling agents were entitled to a commission of half per cent of the price. But the same paragraph shows that the manufacturers could sell sugar in excess of 5,000 maunds directly. The selling agents could not prevent them from doing so. All that they were entitled to was the commission which was payable to them. It must be conceded that, if the selling agents had already entered into some contracts for the sale of sugar in question, then of course the company could not make direct sale of the stock. But this was a matter which the company could have well explained to the revenue authorities, and in the absence of any such material, the tribunal was entitled to come to the conclusion that there were no such contracts actually entered into by the selling agents and the sugar stocks were not sold at once as it was considered more profitable to sell them gradually in normal course of business. They found that the sale of sugar in fact continued up to June, 1944. Some of the observations of the Tribunal have been very severely criticised before us; for instance, where they said that the company spent substantial amount of money in the way of establishment and general charges subsequent to the sale of machinery. It may be that if we had to go into facts ourselves, we might possibly, on a review of the evidence, have come to a different conclusion on the point, but that does not

mean that there is no basis for the finding of the Tribunal, and that we would be entitled to interfere with that finding on such an assumption. This Court is not a Court of facts, and even if a different view were permissible on facts, this Court would not be entitled to reverse the finding of the Tribunal if there is a basis for that finding of fact. In my opinion, the matters which I have discussed above show that there was ample basis for the finding arrived at by, the Tribunal, namely, that the business of the company continued during the accounting year, and in fact it did not cease at any stage.

24. The learned Counsel for the appellant has very strongly relied upon a decision of the Allahabad High Court in *Lalit Ram Mangilal Vs. Commissioner of Income Tax*, , where a Division Bench of the Allahabad High Court interfered with the findings of the Appellate Tribunal and set aside the assessment. But if we examine the facts of that case, it would be quite clear that there the position was entirely different. The assessee carried on business in cloth. During the accounting year he purchased some gold bars. He sold six of them at a profit and utilised two of them for making ornaments for his daughter. The view of the Tribunal was that the said transaction was an adventure in the nature of trade. The High Court, however, took the view that there was no definite finding that the transactions were with the sole object of making profits, and that the facts found by the Tribunal were consistent with the position that the purchase of the gold bars was not with the dominant intention of making profits as claimed by the assessee. Therefore it was not an adventure for trading. It should be noted that the selling of gold bars was not the normal business of the assessee; his normal business being the selling of cloth. The assessee claimed that he had purchased the gold bars on account of the special conditions of life prevailing in the year 1942-43 and was actuated by the desire of converting a part of his capital into portable commodity with which he could run away from his place of business in case of necessity. In the present case, there is no doubt that the purchasing, manufacturing and selling of sugar was the normal business of the company, and it was admitted that until the date of sale and payment of the purchase money, there was no intention of closing down the business but to continue its normal activities. In this connection reference was also made to the observation of Lord President Normand in "*Commr. of Inland Revenue v. Eraser* (1942) 24 Tax Cas 498, where he observed:

"the Appeal Court has always jurisdiction to intervene if it appears either that the tribunal has misunderstood the statutory language - because a proper construction of the statutory language is a matter of law -- or that the tribunal has made a finding for which there is no evidence which is inconsistent with the evidence and contradictory of it."

I have shown above that there is no such error in the present case which would justify our interference with the finding of the Tribunal.

25. At one stage I felt that there was much strength in the criticism of the learned Counsel that the contents of the various documents have not been

specifically discussed by the Tribunal, and we, therefore, allowed ourselves to be taken through those documents. This we did because the learned Counsel for the Taxing Department also raised no objection to it. There is no doubt that if material documents which would have influenced the decision of the Tribunal were ignored from consideration, in so far as they had a bearing upon the points involved, it would be open to this Court to set aside the finding of the Tribunal and remit the case to them for a reconsideration of those materials and then to submit a case afresh. But having examined the materials ourselves, I find nothing to support the argument that the company had ceased its business during the accounting period. Therefore, no useful purpose will be served in remitting the case to the Tribunal. I must not, however, be understood to encourage the practice that the Tribunal is bound to entertain and consider all materials placed before them for the first time and not produced before the Income Tax officers below them. Indeed it is the plain duty of the assessee to place all such materials on which he relies or which are required by the Department from him at the earliest opportunity. It is only in a special case, if at all, that the Tribunal may exercise their discretion in entertaining any fresh materials.

26. It is, in my opinion, unnecessary to refer to the numerous other cases which have been cited by the learned Counsel. Most of those cases show that the High Court refused to interfere with the finding of fact of the revenue Tribunals. I will refer to two decisions in particular on which the learned Counsel has prominently based his submissions. The first is the *Commissioners of Inland Revenue v. The Old Bushmills Distillery Co. Ltd.*" (1927) 12 Tax Cas 1148. In this case, a company carrying on the business of whisky distilling went into liquidation in August 1920, and over a -period extending from the date until March 1923, the liquidator sold off the company's stock of whisky, though the company had ceased distilling operations in March 1921. The company was assessed to corporation profits tax on the sales of whisky during the accounting period running from the 6th April 1921, to the 24th March 1923. On appeal, the Recorder found that the said profits did not arise from the carrying on of the trade of the company, but from realisations, sales and capital transactions incidental to the winding up of the business, and he accordingly discharged the assessment. The Commissioners of Inland Revenue then applied for statement of a case to the King's Bench Division of Northern Ireland. It was held that the question whether the liquidator was carrying on a trade or business was one of fact, and there was evidence to Justify the finding of the Recorder. On the analogy of this case Mr. Mitra has argued that here also the sale of the stock of sugar should be regarded not as carrying on of the company's business but as mere realisation of assets in the process of winding up the business. The distinction between the present case and the case aforesaid is obvious. There the company had already gone into liquidation in August, 1920, and the process of distilling had stopped long before the accounting period. In the " present case there is no such thing. In fact the liquidation actually took place in 1945 long

after the accounting year. The decision, to my mind. is against the contention of the learned Counsel because in disposing of the case Moore, L. C. J., observed:

"In my opinion the question remained a pure question of fact. Was the company trading or Was it not? The Recorder has found as a fact that these were not ordinary trading sales, and, that, therefore, the profits were not profits of trade. On the evidence we cannot override the decision of the learned Recorder, nor decide that he was bound to find the company liable."

Brown, J., concurred in that decision and he also observed:

"the question whether or not the liquidator was carrying on a trade or business was a question of fact."

Therefore, when the Tribunal in the present case has come to a definite finding that the assessee was carrying on business, it is impossible for us to override that finding which related to a pure question of fact.

27. The next case is a decision in "Commissioners of Inland Revenue v. Nelson" (1939) 22 Tax Cas 716. In this case the assessee was a whisky-broker, purchasing and storing in bond whisky or eventual resale. He had earned great reputation in his trade and was" known to be a Holder of large stocks of whisky. In 1936 and 1937 he was in poor health and in March 1937, he entered a sanatorium and was advised to go for a long sea voyage. He in fact went to South Africa later on. As he had been for some time contemplating retirement from business, the assessee on the 15th July 1937, closed his banking account and instructed his accountant to take steps to wind up his business. On the next day he also notified his creditors and customers through the press and by circular letters of his retirement from business. After this on the 27th of July, 1937, he sold his whisky and casks, trade name, office furniture, fittings, etc. The profits on this sale were assessed by the Income Tax authority, and on appeal the Special Commissioner found that the business had ceased on the 15th of July 1937, and that the sale having taken place after the trading had ceased was not a realisation of profits in the course of trade. Against that the Commissioners of Inland Revenue took the matter on a reference to the Court of Session. Here again the Court held the judgment having been delivered by Lord President Normand that:

"The Special Commissioners have concluded in fact from the whole circumstances that the sale was not a sale in course of trade and I am unable to say that there was no evidence to support this conclusion."

At another place in the judgment Lord Normand made the following observation:

"But I am of opinion that sale of a stock-in-trade such as whisky or grain on realisation may be either a sale in the course of trade or a sale not in the course of trade according to circumstances, and that the Special Commissioners here had, in the facts admitted or proved, evidence on which they were entitled to hold that the sale was not a sale in the course of trade."

Here, I should observe that the Tribunal were entitled to hold on evidence whether the sale profits were in course of-business of the company or after the cessation of business, and it is impossible for us to say on the facts of this case that there was no evidence to support the conclusion of the Tribunal. The facts of the case also do not help the learned Counsel because there was justification for the Special Commissioners to come to the finding which they did. In that case there were ample materials to show that the sale had taken place after the assessee had wound up and retired from his business.

28. Mr. S. N. Dutt, on behalf of the Department has very rightly pointed out that in none of the cases cited by Mr. S. Mitra for the assessee the High Court interfered with the findings of fact arrived at by the Income Tax Tribunals in holding whether trading was or was not being carried on by the assessee in each case. The only exception was the case in AIR 950 All 390, where the facts found did not amount to trading at all. He has also drawn our attention to a decision in "Hillerns and Fowler v. Murray" (1932) 17 Tax Cas 77. The facts of the case show that there was a partnership agreement for a limited period and after the expiry of the period the partnership stood dissolved by lapse of time. The assessment in the case related to business carried on by the partnership after its dissolution. The partnership had trading stock and received further stocks on account of the previous contracts and supplied the stocks to customers. It was held by the revenue authorities that business was being carried on, and the High Court of Justice refused to interfere because there was evidence upon which it could be found that the appellants were trading even after the date of dissolution of partnership. This was a much stronger case where profits earned after dissolution of business were found taxable. Indeed Mr. Mitra himself concedes that even after the winding up if there was evidence to show that business was being carried on account of unexecuted contracts previously entered into, the profits would be liable to assessment.

29. These decisions which I have referred to above all lead to the conclusion that it is not open to this Court to interfere with a finding of fact arrived at by the Tribunal. The question whether a business was or was not being carried on was purely a question of fact, and as the finding arrived at by the Tribunal does not appear to have been vitiated by any misconception of the legal position, I cannot see my way to interfere with this finding. As I observed above, a reference on such a question of fact did not lie to this Court,

30. In regard to the next question, the learned Counsel contended that the decision of the Tribunal was quite clearly wrong because the amount of profits of Rs. 15,882/- was not based upon any evidence. In an earlier part of this judgment I have already dealt with this question, and it is unnecessary for me to repeat what I have said in regard to it. I am inclined to agree that the decision of the Tribunal on the point was erroneous, but it has been rightly contended on behalf of the Taxing Department that we are precluded from going into the matter because of the specific question which has been referred to us. The

question as framed is: "Was the profit of Rs. 15,882/- on the sale of stores of the factory taxable under the Income Tax Act in the circumstances of this case." So the amount of Rs. 15,882/- has not been called in question. The only question is whether it is assessable to tax. The learned Counsel for the assessee vehemently urged that the Tribunal did not propose to interfere with the last part of question No. 7 as suggested by them which is as follows: "In any event, was there any evidence upon which the Tribunal could hold that such profits amounted to Rs. 15,882 -- ?" I am afraid this contention cannot be entertained. Whatever the view of the Tribunal may have been, the specific question which they have referred to us precludes the assessee from reopening the matter that there was no evidence on which the Tribunal could hold that the profits on the said item amounted to the above sum. The proper remedy of the assessee in such a case was to apply to this Court Section 66 (2) of the Act for calling for a reference on the point within the period of limitation allowed by law. This was not done by the assessee, and, therefore, on the question referred to us we cannot now say that the profit of Rs. 15,882/- as assumed by the Tribunal was without any basis. This contention also, therefore, fails.

31. The result is that the answer to both the questions under reference is in the affirmative, and the decision of the Tribunal is upheld. The reference may be answered accordingly.

32. After this judgment had been prepared, my learned brother Shearer, J., in course of consideration of the matter discovered certain aspects of the case which had not been specifically pressed into our consideration at the Bar. Those aspects had an important bearing upon the interpretation of Section 10 (2), (vii) of the Income Tax Act, 1939. Shortly put, they may be stated as follows: (1) whether the second proviso to Clause (vii) would apply to a case where the profits are made out of transactions entered into, not with a view to replacing a machinery or plant in use for the purposes of the business but out of a transaction entered into by way of closing down the business permanently; and (2) whether the said clause would apply in a case where the machinery in question has not been admittedly used for the particular purpose for which the machinery had been intended. We accordingly heard fresh arguments on these points and after having given my anxious thought to the matter, I regret to have to observe that I find nothing to make me change my mind with respect to the answers which I have suggested above. I must briefly indicate my reasons on the points though at the risk of adding to the volume of this judgment.

33. Clause (vii) of Section 10 (2), as it stood prior to the amendment of 1939, made provisions for an allowance only in respect of machinery or plant which in consequence of its having become obsolete had been sold or discarded. In that event the assessee was entitled to an allowance in respect of the difference between the original -cost to the assessee of the machinery or plant as reduced by the aggregate of the allowances made in respect of depreciation under Clause (vi) of the section, and the amount for which the machinery or plant was actually

sold or its scrap value. In other words, if the original cost of the machinery was, say for instance Rs. 50,000, and if the aggregate amount of depreciation allowed on account of that machinery was Rs. 25,000, then if the machinery or plant actually came to be sold for Rs. 20,000, the assessee was entitled to an allowance of Rs. 5,000. This Rs. 5,000 represents as it were the loss which the assessee sustained on the sale of the plant or machinery for a price lower than the written down value or the depreciated value. We may assume that the written down value indicates the amount left after deducting the amount of the total depreciation allowed to the assessee from the actual cost price of the machinery or plant. It is to be noticed that this clause, as it stood prior to the amendment of 1939, provided only for machinery and plant which in consequence of obsolescence had come to be discarded or sold. It also provided for an allowance in case of loss sustained by the assessee on sale of the obsolete machinery for a price below the written down value. There was, however, a significant omission. It did not take into account the possible cases of profits earned by an assessee on such sales which were for a price in excess of the written down value and in certain cases even in excess of the original cost. The result was that the assessee had only advantages. He had the advantage of the depreciation allowance already given to him on account of the wear and tear of the machinery used in course of business. He had also the advantage of the profits on sales where it exceeded the written down value. To add to these in case of sales for a lower price than the depreciated value the advantage of a further allowance on account of the difference was also secured to him.

34. When the provision was amended in 1939 (this being the provision with which we are concerned in this case), it provided for an allowance in respect of any machinery or plant which had been sold or discarded not merely on account of its becoming obsolete but also on account of any other factor. In all such cases an allowance had to be made to the assessee in respect of the amount by which the written down value of the machinery or plant exceeded the amount for which the machinery or plant was actually sold or the scrap value thereof, provided also that such amount was actually written off, in the books of assessee. Except for the "writing off" this was in effect also the old law. But what is more important, however, is that in 1939 a further proviso was added to the clause which is as follows:

"Where the amount for which any such machinery or plant is sold exceeds the written down value, the excess shall be deemed to be profits of the previous year in which the sale took place."

35. This proviso clearly shows that whereas, on the one hand, the assessee was entitled to an allowance for the difference between the actual sale price and the written down value, where the former was less; the assessee, on the other hand, became liable to be taxed by way of profits in case the actual sale price for which the plant or machinery was sold exceeded the written down value. Therefore, the effect of the amendment was firstly to guarantee an allowance to the assessee

where the aggregate of depreciation already allowed to him did not cover the loss sustained on the sale of the property or its scrap value, and secondly where he made a profit over the written down value, to tax such a profit by way of income, he having already had the benefit of the depreciations allowed to him by the Revenue Authorities. The amendment thus equitably balanced the advantages which had been conceded to and enjoyed by the assessee under the law as it stood prior to 1939. But it created a disadvantage in another respect, namely, that it proceeded to claim as taxable income even the price fetched on sale in excess of the actual cost price. To use the illustration given above, it may be observed that if the property is actually sold for Rs. 60,000 then the difference between the written down value and the price for which it is sold would be deemed to be profits; in other words, Rs. 35,000 would be added up as the income of the assessee during the accounting year in which the sale took place. Thus the proviso, as it stood after the amendment of 1939, treated as income the entire Rs. 35,000 though in fact the property was actually purchased for Rs. 50,000 only, and the sum of Rs. 10,000 earned by the assessee was in excess of the actual cost price and may have been regarded as profits on capital.

36. This anomaly was subsequently rectified by an amendment in 1947 wherein it was specifically provided that the difference between the written down value and the actual sale of the property which was to be treated as income should not in any case exceed the difference between the original cost and the written down value. In other words, only Rs. 25,000 in the illustration in question after the amendment of 1947 would be treated as income within the meaning of the provision, whereas the remaining Rs. 10,000 would be regarded as capital gain. The introduction of 12-B by the amendment of 1947 which Section deals with capital gains strengthens the same conclusion.

37. It appears, therefore, that the intention of the amendment of 1939 to Section 10 (2) (vii) of the Act quite clearly was to make equitable adjustments on account of depreciation allowances for plants and machineries used in business. This depreciation allowance, after all, had to be on a notional basis: if the depreciation allowed did not cover the loss incurred on actual sale of the property or its scrap value, then a further proportionate allowance had to be made to the assessee; if on the contrary, the assessee made a profit on the sale and recouped himself in regard to the total amount of depreciation already allowed to him, then the amount of depreciation along with the excess profits over the actual cost price had to be treated as the income of the assessee.

This anomaly about the excess over the cost price, as I have shown above, has been subsequently removed by the amendment of 1947. It is under the above proviso to Section 10 (2) (vii) of the Act of 1939 that the Department is claiming assessment over the income of the assessee earned from the sale of the plants or machineries. I have already discussed that the definition clause relating to "income" had also to be amended in view of this change in the law so as to include such profits in the definition of "income." This sale having taken place

during the year of accounting and at a time when the business was actually running, there seems to be no reason why the second proviso to Clause (vii) of Section 10 (2) of the Act should not apply to the case.

38. It is, however, argued that the word "any" in the aforesaid clause shows that it cannot relate to a case where the entire aggregate of plant or machinery is sold as it has been in this case but refers to individual items of plants or machineries. Where the aggregate of plant or machinery is sold and the business is intended to be closed down, it is suggested that the proviso will not operate as it must be restricted only to a case where the business is running and where the plant or machinery sought to be sold is intended to be replaced. In my opinion, the learned Counsel for the Department is right in contending that even if the aggregate of plant or machinery is sold, the calculation of the profits would be on the basis of the individual items, and therefore in any case the frame of the clause will have to be in the manner in which it has been drafted. It is rightly pointed out that the calculation cannot be in respect of the aggregate of machinery or plant but in respect of the written down value of each item, see for instance "Charente Steamship Co. Ltd. v. Wilmot" (1942) 24 Tax Cas 97: (1942) 1 KB 210. All that the Section requires is that the sale of the plant or machinery must have taken place in course of the continuance of the business during the accounting year. On the finding as it stands, the business did continue up to the date of the sale and even after the sale, and therefore the profits earned on account of the sale of these plants will have to be taxed as income within the meaning of the second proviso to Clause (vii) of Section 10 (2) of the Act. I do not see how any different principles can arise on the plain wording of the section.

39. The other point that the machinery or plant was admittedly not in use for manufacturing purposes during the year of accounting and therefore any profits gained on account of the sale thereof could not be deemed to be profits of the business did at first create a great deal of impression on my mind. This argument was evidently based on the analogy of Clause (vi) of Section 10 (2) of the Act wherein an allowance for depreciation of the machinery in use is permissible. It was suggested that if during the period of accounting the machinery in question had not been used, then the assessee would not be liable to any allowance on account of depreciation of such machinery or plant as provided by Clause (vi) of Section 10 (2) of the Act. For this purpose, reliance was placed upon a decision in (1937) 5 ITR 734 . This was a case where the assessee was engaged in the business of mining and selling manganese. In the year of accounting there was no mining operation at all, and the only business which the company did was of selling the manganese already mined. The assessee, however, claimed a deduction on account of the depreciation of the plants and machineries used for the purpose of mining. It was held that the assessee was not entitled to such an allowance. The considerations which applied to the interpretation of Clause (vi) of Section 10 (2) of the Act cannot in toto apply to the interpretation of Clause (vii) of the section. The learned Counsel for the Department has laid much stress upon the presence of the word "such" in Clause (vi) aforesaid and the absence

thereof in Clause (vii) as it stood in the Act of 1939. He argued that the word "such" indicates that the building, machinery, plant or furniture in Clause (vi) must have been used for the purposes of the business during the period of accounting, and if it has not been so used, then depreciation could not be allowed; whereas in Clause (vii) the absence of the word "such" shows that the plant or machinery during the year of accounting need not necessarily have been used for the purpose of carrying on the business. In my opinion, the absence of the word "such" in Clause (vii) does not make any material difference; though I agree that in order to enable the assessee to claim a depreciation allowance in any particular year the machinery must have been used for earning the profits of the business in that year, e.g.; A new machinery which has not been used will not be a subject of depreciation allowance. There can be no doubt that the plant or machinery mentioned in Clause (vii) must also have reference to the business and must be in connection with the business carried on by the assessee. But, in my opinion, the real key to the interpretation of Clause (vii) lies in the use of the expression "discarded" with reference to plant or machinery referred to in the clause. A discarded machinery may have been discarded even before the year of accounting and therefore could not have been actually used for the business in question during that year. Even then if it was sold during the year of accounting and written off in the books of the assessee, the assessee, as the case may be, would be respectively entitled to an allowance or liable to assessment in case the sale was for a price lower or higher than the written down value. Therefore, although the plant or machinery sold was not during the year of accounting actually used for manufacturing sugar, yet this factor would be no bar to the application of Clause (vii) of the Act provided the business otherwise continued. if the assessee had claimed a depreciation in respect of the plant or machinery during the year of accounting, such an allowance might possibly have been refused to him on that account. Therefore, in my opinion, the decision in (1937) 5 ITR 734 has no application to the point which we are at present investigating with reference to the interpretation of Clause (vii) of the section.

40. It does not appear to me that the interpretation which I am giving will work any hardship on the assessee. By virtue of Clause (vii) he gets the benefit of any loss which he incurs in case of sale below the written down value, and the Department has to make an allowance for it in his favour. There is no reason why if he makes a profit over the written down value, he should not be liable to assessment on that profit and in effect reimburse the Department. This seems to have been the evident intention of the amendment of 1939 which applies to the present case. It is true that the amendment went a little further inasmuch as it included as profit even the amount fetched on sale in excess of the original cost of the plant or machinery; but that, as I have said, was subsequently cured by another amendment where such a profit in excess of the original cost was not regarded as profit of the business. This consideration, however, cannot affect the interpretation which we have to give to the clause as it stood under the Act of 1939. The Act itself does not indicate that the allowance by way of depreciation

or by way of loss below the written down value was only with the intention of providing for re-placement of the plant or machinery. It may be that usually a plant or machinery would be replaced where the business is kept going but this consideration is foreign to the interpretation of the language of the provision. Nor does it appear to me to be any hardship if before finally winding up the business the assessee makes a profit by the sale of the entire plant and machinery with which the business was carried on, provided the sale was during the continuance of the business. Of course, if the sale was held long after the business had definitely closed down, which is not the case here on the findings, then the position might have been different. In that case there is no business on the profits of which the assessee could be taxed within the meaning of Section 10 (1) of the Act, the business having closed long before the actual sale of the plants or machineries.

41. For these reasons, therefore, I see no ground to alter the conclusion at which I have arrived in suggesting the answers proposed.

(In view of the difference of opinion between Shearer and Sarjoo Prosad, JJ., the case came before Ramaswami, J., who delivered the following judgment;)

42. This reference is made by the Income Tax Appellate Tribunal, Calcutta Bench, u/s 66 (1) of the Indian. Income Tax Act.

43. The reference relates to an assessment order made by the Income Tax Officer, Special Circle Patna, on 21st June 1947 against the assessee. The order was with respect to Income Tax for the year of assessment 1945-46 but was based on the accounting period from 1st October 1943 to 30th September 1944. The assessee is "Pursa Limited", a joint stock company which carried on business in growing, manufacturing and selling sugar. The assessee company was incorporated under the Indian Companies Act but the share-holders and directors resided in the United Kingdom and directed the affairs of the company therefrom. The company went into voluntary liquidation on the 20th June 1945 and is at present represented by "liquidators in this Court. In June 1943 the directors had commenced to negotiate for the sale of the factory and other assets with the ultimate object of winding up the business. On 7th December 1943, an agreement for sale was concluded between the assessee on the one hand and Messrs. Dalmia Jain & Co. on the other. The memorandum of agreement provided that the vendor was to sell and demise to the purchaser for a total price of Rs. 28 lakhs all the lands, buildings and machinery and plant. But the stock of manufactured sugar and of grain lying in the godown was expressly excluded and remained the property of the company. It was stipulated that the possession of the assets covered by the contract was to be delivered to the purchaser after the execution of the agreement and after payment of the purchase price. There was a clause that even after possession had been delivered and up to one year from that date the company would retain the right to occupy the manager's bungalow and godown in order to enable the company to dispose of the stock in trade and other capital assets not covered by the sale.

On 7th December 1943, the consideration of Rs. 28 lakhs was paid by Messrs. Dalmia Jain & Co. and three days later possession of the factory was taken by the vendee. On 7th December 1943 the assessee possessed sugar stocks valued at Rs. 6. lakhs and it is not controverted that the assessee continued to sell the stock of sugar up to June 1944 and the total price realized was Rs. 74 lakhs. In the course of the present assessment proceeding the Income Tax Officer wrote to the company to show cause why the activities of the company during the accounting year should not be taken as tantamount to realisation of the assets on liquidation. In their reply dated the 19th March 1947 the liquidators asserted that the company carried on business during the accounting year and did not merely realise assets. They claimed that the various debits contained in the sugar factory accounts were those incurred in carrying on the company's business. The liquidators accordingly pressed for deductions which they had claimed in their return. On receipt of this letter, the Income Tax Officer on 7th May 1947 informed the liquidators that the profits made by the company on the sale of the buildings, plant and machinery were taxable under the second proviso to Section 10 (2) (vii) of the Indian Income Tax Act and he called upon them to furnish certain particulars in regard to sale price of the machinery and plant and the original cost which the company had incurred. On 22nd May 1947, the liquidators wrote to the Income Tax Officer that the proceeds arising out of the sale of the company's plant and machinery were not taxable since the company had ceased to carry on business. But the Income Tax Officer held that the proceeds of the sale of plant and machinery and the value of the stores were liable to assessment u/s 10 (2) (vii) of the Income Tax Act. Accordingly by his order dated 21st June 1947 he added a sum of Rs. 13 lakhs and odd on account of the proceeds of the sale of plant and machinery and Rs. 15,882/- on account of the proceeds of the sale of stores. The assessment was affirmed in appeal by the Appellate Assistant Commissioner of Income Tax by his order dated 31st January 1948. The Appellate Assistant Commissioner held that in the year of account there was no manufacture of sugar by the company and there was only sale of sugar. But he agreed with the Income Tax Officer that the sale of sugar by the company amounted to carrying on business, that the plant and machinery were sold during the continuance of the business and the profits made by the company were liable to assessment u/s 10 (2) (vii). Before the Appellate Tribunal the assessee did not dispute the correctness of the figure as to the amount of profits in respect of the sale of machinery and building. But his argument was that Section 10 (2) (vii) of the Act had no application to the case since the sale had been effected in the process of winding up the company and realising its assets. Appellate Tribunal however rejected the contention of the Assessee holding that the sale of sugar continued up to June 1944 and the assessee had spent substantial amount of money in the way of establishment and general charges even after the machinery and plant had been sold.

44. At the instance of the assessee the Appellate Tribunal formulated the following questions for the determination of the High Court:

"(1) On the facts and in the circumstances of this case is the surplus of Rs. 13,05,144 arising out of the sale of plant and machinery of the sugar factory chargeable u/s 10 (2) (vii), and (2) Was the profit of Rs. 15,882/- on the sale of stores of the factory taxable under the Income Tax Act in the circumstances of this case."

45. The reference was argued before Shearer and Sarjoo Prosad, JJ., in the first instance. But the learned Judges did not agree as to the answers to be furnished to either of the questions raised. Shearer, J., held that Section 10 (2) (vii), was applicable only in the case of a business which had continued during the year of assessment and in succeeding year, that it did not apply to a business which had been discontinued or was in the process of being discontinued. The learned Judges considered that the Appellate Tribunal had misdirected itself in law as to the scope and effect of the second proviso to Clause (7) of Section 10 (2); and that the sum of Rs. 13 lakhs and odd was not liable to be taken into account in assessing Income Tax on the assessee during the year of assessment. Upon the second question Shearer, J., held that there was no material upon which the Income Tax Department could draw the inference that the profit of Rs. 15,882 was made by the assessee on the stores of the factory and therefore the amount of Rs. 15,882/- was not taxable under the Income Tax Act. On both these Questions Sarjoo Prosad, J., expressed a contrary view. As regards the amount of Rs. 13 lakhs and odd Sarjoo Prosad, J., held that Section 10 (2) (vii) would apply even to a case where the profits were made out of transaction entered into with a view to closing down the business and not with a view of replacing the machinery and plant. The learned Judge accordingly found that the amount of Rs. 13 lakhs and odd was liable to be taxed. As regards the amount of Rs. 15,882/- Sarjoo Prosad, J., held that upon the question as framed it was not open to the assessee to argue that there was no evidence upon which the Tribunal could hold that the profits amounted to Rs. 15,882.

46. In view of the difference of opinion this case has been placed before me for decision u/s 98 (2) of the CPC read with Section 66-A of the Indian Income Tax Act.

47. The learned Judges have formulated the following points of law on which they have differed ;

(1) "When, in the process of closing down a manufacturing business, the entire aggregate of plant and machinery is sold, is the difference between the price obtained at the sale and the written-down value of the plant and machinery to be deemed to be profits of the business and assessable to Income Tax under the proviso to Section 10 (2) (vii) of the Indian Income Tax Act? Does it make any difference that the business of selling goods manufactured in the previous accounting year has continued? and (2) when, in such a case, stores used in the business are sold, is the difference between the price paid by the vendee and the value which the vendee puts on the stores in his books of account a profit? If so, is it deemed to be a profit of the business and liable to Income Tax under the

aforesaid provision?"

48. It is desirable at the outset to call attention to the scheme and structure of the Indian Income Tax Act. Section 6 of the Act enumerates the various heads of income chargeable to Income Tax. Item (iv) of this Section relates to "profits and gains of business, profession or vocation". The term "business" is defined in Section 2(4) to include any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture. Section 10 of the Act is a Section which deals specifically with income arising from business which is chargeable to Income Tax. Sub-section (1) of this Section provides that the tax shall be payable by the assessee under the head "profits and gains of business, profession or vocation" in respect of the profits or gains of any business, profession or vocation, carried on by him. In the twelve clauses of Sub-section (2) are enumerated various deductions which are permissible out of the gross profits in order to arrive at the taxable profits of the business. Clause (iv), for example, provides for a deduction on account of insurance premium paid for insuring buildings, plant, machinery etc. against the risk of damage or destruction, Clause (v) refers to current repairs of such buildings, plant, machinery or furniture. Clause (vi) provides that an allowance may be claimed in respect of depreciation of such buildings, machinery, plant or furniture which is equivalent to such percentage on the original cost to the assessee as may be prescribed in any case. Clause (vii) enacts that an allowance may be claimed "in respect of any machinery and plant which had been sold or discarded, the amount by which the written down value of the machinery or plant exceeds the amount for which the machinery or plant is actually sold or its "scrap value". This clause is subject to the first proviso that such amount should be actually written off in the books of the assessee. The second proviso is important, for it enacts that "where the amount for which any such machinery or plant is sold exceeds the written down value the excess shall "be deemed" to be profits of the previous year in which the sale took place". It should be noticed that S. 2 of the Act has been correspondingly amended; and Sub-Section (6c) states that "income" includes any sum deemed to be profits under second proviso to Clause (vii) of Sub-section (2) of Section 10."

49. The issue in the present case depends on the true meaning and effect of the second proviso to Clause (vii) of Section 10(2) of the Act.

50. Before the amendment of 1939, Section 10(2) (vii) only made an allowance admissible "in respect of any machinery or plant which in consequence of its having become obsolete had been sold or discarded", the allowance being "the amount by which the written down value of the plant or machinery exceeds the amount for which the machinery or plant is actually sold or its scrap value". To cite an example, if the original cost of the machinery was Rs. 10,000, depreciation allowed up till the year of sale was Rs. 3000, written down value was Rs. 7000 and the plant was sold for Rs. 6000, the balancing allowance would be Rs. 1000. But it was incumbent on the assessee to show that the machinery

or plant had become obsolete, before he could be granted the allowance. It was not however made a condition as it was in the corresponding English statute of an allowance being granted that the obsolete plant or machinery should have been actually replaced by a modern and up-to-date type. When the clause was amended in 1939 it ceased to be a condition that the machinery or plant should have become obsolete. The allowance could be claimed by the assessee even though the machinery or plant was not technically obsolete but such plant or machinery was sold or scraped for any reason whatever. The allowance in the case of sale was of such sum as represented the excess of the written down value over the sale proceeds. The purpose of the allowance was that the balance of the amount of capital expenditure remaining unallowed minus the amount of sale proceeds should be granted to the assessee so as to enable him to recoup his cost in full. In the English Act of 1945 the allowance is for this reason called "balance allowance". The allowance is similar in its nature to depreciation, which is a loss and expense incurred in using the asset for the earning of profits and ought therefore be charged against those profits they have earned. If instead of being sold, the machinery is merely discarded or put aside, the entire written down value on that date would represent the allowance. In either case, such amount is required to be completely written off in the books of the assessee. But where a sale of a machinery or plant or a building fetches an amount in excess of the written down value there is no scope of any allowance to be granted to the assessee but a different principle operates. The principle is that such portion of the depreciation allowance granted in the past and which has proved unwarranted should be brought into charge. In other words the charge is imposed to balance the depreciation allowance already granted to the assessee and which turns out in the event to have been undeserved. For this reason the charge is styled "balancing charge" in Section 68(i) of English Income Tax Act, 1945. To take the previous example, if the plant is sold for Rs. 11,000, the amount of Rs. 4000 would be charged to tax. The amendment of 1939 was defective in one respect for the amount of sale proceeds in excess of cost price was taxed though it should be capital profit, free of tax. The defect was removed by Act VIII of 1946 wherein provision was made that the difference between the written down value and the actual sale price of the plant which was to be treated as income should not in any case exceed the difference between the original cost and the written down value. In other words, the effect of the 1946 amendment was to tax the entire depreciation allowance granted till the time of sale but the excess of the sale proceeds over cost price of the plant was treated as capital profit free of tax. On behalf of the assessee, it was contended by Mr. Mitra that Section 10(2) (vii) will operate, and the excess sale proceeds will be taxable, only if the machinery or plant sold has been replaced and the business of manufacture continued in the year of account. It was argued in effect that the Section 10(2) (vii) will not be applicable if the machinery was sold in the process of closing down a manufacturing business. I see no reason why the Section should be construed in this restricted manner. There is no express condition (as in the corresponding English statute,) that the allowance could be claimed only if

the assessee replaced or intended to replace the machinery or plant which had been sold. It was also contended for the assessee that Clause (vii) will not operate in a case where the entire aggregate of plant or machinery is sold. In my opinion this argument too is not valid. As a matter of construction, the words of the clause "any machinery or plant" are obviously applicable to any number of items of machinery or plant. It is clear that the clause applies in a case where the entire aggregate of plant or machinery is sold, though the calculation of allowance or tax cannot be in respect of the aggregate of the machinery or plant, but will be in respect of the written down value of each separate item (see "Charente Steamship Co. Ltd. v. Wilmot" (1942) 24 Tax Cas 97. For the application of Section 10 (2) (vii), it is immaterial that the sale is effected of each separate item of machinery or of the whole aggregate of machinery or plant in one block broken up or in running condition.

51. It is a well-known principle that in a taxing statute there is no room for any presumption or intendment. If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. In a taxing statute, there is no room for any intendment. In the "Cape Brandy Syndicate v. Commrs. of Inland Revenue" (1921) 12 Tax Cas 358 Rowlatt J. observed:

"Now of course it is said and urged by Sir William Finlay that in a taxing Act clear words are necessary to tax the subject. But it is often endeavoured to give to that maxim a wide and fanciful construction. It does not mean that words are to be unduly restricted against the Crown or that there is to be any discrimination against the Crown in such Acts. It means this, I think; it means that in taxation you have to look simply at what is clearly said. There is no room for any intendment; there is no equity about a tax; there is no presumption as to a tax; you read nothing in; you imply nothing; but you look fairly at what is said and at what is said clearly and that is the tax."

52. On behalf of the assessee, the argument was addressed that if Section 10(2) (vii) was to operate the assessee must "carry on business" within the meaning of Section 10(1) of the Act. It was pointed out that the object of the assessee in selling the machinery and plant was to wind up and discontinue the business, that it was immaterial that the business of selling goods already manufactured continued since the business of manufacturing goods had been stopped. The argument is attractive! but, in my opinion, it is wholly untenable. Though the object of the directors may be to wind up the business and not to earn the profits by the continuance of the business still if the nature of the activities appertain to commercial methods the company would carry on a business in legal sense For it is no paradox to say that there can be trading or carrying on of business during the course of winding up of affairs of a business. A trader for instance who wishes to retire from business may wind up his business in several ways. He may sell his concern as a going concern or he may auction off his stock. But he may also without resorting to a forced sale involving him in a sacrifice, wind up by

continuing to carry his business in the ordinary way, without however replenishing his stock. He would ultimately leave himself with no stock and then retire. In these circumstances the realisation of stock would effectuate both his purposes and consequently there would be trading. For example in "*J. & R. O'Kane & Co. v. Commrs. of Inland Revenue*" (1921) 12 Tax Cas 303 the appellants, who carried on business as wine and spirit merchants, issued a circular letter early in 1916, announcing their decision to retire from business, and shortly afterwards they issued to their regular customers lists of spirits for sale. The lists were headed "Retiring from business" and contained certain conditions of sale which required that the purchaser should clear the goods from bond and retain the casks. During the year 1916, few sales were made, but during the year ending 31st December 1917, practically the whole of the stock was sold. Meanwhile the appellants had acquired a certain quantity of spirits up to the spring of 1917 under running contracts with distillers, but no other purchases were made. The appellants were assessed to excess profits duty for the year 1917 in respect of the profits arising from the whole of their sales in that year, and on appeal, it was held by the House of Lords that there was ample evidence on which the Special Commissioners could arrive at their findings and that the appellants were liable to excess profits duty in respect of the profits in question. In his speech Lord Buckmaster states (at page 347) :

"The first question, therefore, is: Did the profits in question arise from any trade or business? It is alleged that they did not, for the reason that they were derived, not in carrying on the business, but in the process of realisation under an altered method of trading not consistent with a continuing concern.

My Lords, I find it difficult to think that these considerations can in the circumstances of this case afford any protection to the appellants. For in truth it is quite plain that right up to the end of 1917 they were engaged in trading which, so far as the external world is concerned, was the ordinary method of carrying on trade modified only by arrangements which were merely part of the machinery of business dealing adopted to effect their intention to retire. It may well be accepted that they did so intend; yet the intention of a man cannot be considered as determining what it is that his acts amount to: and the real thing that has to be decided here is what were the acts that were done in connection with this business and whether they amount to a trading which would cause the profits that accrued to be profits arising from a trade or business?"

53. In a similar case, "*Hillerns & Flower v. Murray*" (1932) 17 Tax Cas 77 the partnership agreement by which the assessee firm was constituted, expired on 31st March 1926. The dissolution of the partnership by lapse of time was announced to customers by circular letter dated 31st March 1926. On that date, the firm held certain trading stock, and after that date the partners received delivery of further stock contracted to be bought before that date. The stock thus held and acquired was delivered to customers in fulfilment of contracts made before, but due for fulfilment after 31st March 1926. No new contracts of

purchase or sale were made after 31st March 1926. An assessment to Income Tax was made upon the firm for the year 1926-27 in respect of profits realised through the fulfilment of contracts in that year. On appeal it was held by the King's Bench Division that there was evidence upon which it could be found that the appellants were trading after the date of dissolution of partnership. At page 91 Romer L. J. states:

"When there is stock-in-trade which can only be sold at a sacrifice by what is called a forced sale--some immediate sale by auction -- it may be necessary, in order to dispose of that stock-in-trade to the best advantage, to carry on the business so that the stock-in-trade can be sold in the usual course of trade. That seems to me to have been the case in Ireland which came before the House of Lords in "O' Kane's case" 12 Tax Cas 303. Or it may be, and in my opinion this is what happened in the present case, the partnership may be possessed of outstanding contracts of a beneficial character. In that case, instead of shutting up the whole business and letting the people who suffered damage by breach of contract be paid their damage at winding-up, it is considered more beneficial to the partnership to continue the business for the purpose of completing the contract. In those circumstances, of course, it would be impossible to say that the fact that all that was done by the partners was to realise the assets to the best advantage necessarily showed that they were not carrying on a business, because in many cases, in fact I think one might say in most cases, in the case of a winding-up of a partnership it is necessary, for the proper getting in of the assets and the winding-up of the affairs of it, to carry on the business for a short time, or to carry on the business to a limited extent."

54. The question therefore in the present case is whether the assessee was carrying on the business in the year of account. It is not material to enquire whether the transactions were entered into with the ultimate object of closing down the business or liquidating it. But the question whether the company carried on business is essentially a question of fact, for the decision of the question depends upon the quality and character of the facts established in the case. (See for instance "Martin v. Lowry" (1927) AC 312; "Ducker v. Rees Roturbo Development Syndicate, Ltd." 1928 AC 132. The Appellate Tribunal has found in the present case that the assessee company was carrying on business after the factory had been sold during the year of account. This conclusion is one of fact and there are materials in this case upon which the Appellate Tribunal could properly reach this conclusion of fact. In the first place there is the admitted circumstance that in the memorandum of sale dated 7th December 1943 the stock of sugar was not included. From the affidavit of Robert Adam Brown it appears that on 30th September 1943 the stock of sugar was 52860 maunds that out of this stock the company made direct sales of 822 maunds and the balance of stock was sold by Messrs Bird & Co. between December 1943 and June 1944. It is stated in the same affidavit that there was an agreement between the assessee company and Messrs. Bird & Co. dated 22nd April 1942 by which the latter were appointed sole selling agents for a period of five years

from 1st January 1943 and the assessee company undertook that they would not themselves or through any other agent sell any sugar manufactured in the factory though by clause 16 of the agreement the assessee company did retain the right to effect direct sales up to 5,000 maunds per season. The Appellate Tribunal has found that the stock of sugar was valued at Rs. 6 lakhs but it was sold for Rs. 7 1/2 lakhs. It is an admitted fact the company spent a sum of Rs. 50,000 on account of establishment and general charges even after the machinery and plant had been sold. It appears that the proposal to sell the plant and machinery was agreed to on 8th October 1943 in a general meeting of the shareholders of the company. But the contract of sale was actually executed and the purchase-money paid on 8th December 1943 and possession was given to the purchaser Dalmia Jain & Co. on 10th December 1943. It is true that there was no crushing of sugar cane on the part of the assessee during the accounting period but the crushing season, it is conceded, did not start until the month of December. On behalf of the assessee Mr. S. Mitra, contended that the Tribunal had failed to consider copies of certain minutes of the Board meetings and the correspondence between the company's administration and the Board of Directors. The Appellate Tribunal has referred to these documents though the matter is not considered in detail. In any case, the documents do not, in my opinion, support the contention of the assessee that no business was carried on in the accounting year. For in his letter dated 24th (April 1948) Commander Dixon states that "the trading and manufacturing had to be carried on until such time as any sale was "completed". Commander Dixon states that "in negotiating : the sale of the assets in connection with the mill and zerats, sugar stocks and grains were purposely excluded as it could not be known at what date such a sale would be concluded, and the quantity of both these items and also their market prices must vary from day to day." According to the contract with Messrs. Bird & Co. the sugar of 1943 must be sold by the latter according to the requirement of the market and despatched according to delivery dates required by the purchaser. Commander Dixon states that these despatches were completed by 1st March 1944, that these despatches were a completion of contracts made by the selling agents of sugar given to them to sell before the sale of the factory was completed. The affidavit of Robert Adam Brown is to the same effect. He says that for the purpose of : manufacturing sugar the company grew a certain amount of sugar cane on its own lands and purchased further supplies of cane and that all land on which the company grew sugar cane was sold as part and parcel of the Pura Sugar Factory, & the company thereafter grew no more sugar cane and did not buy any sugar cane. The affidavit states that between 9th August 1943 and 7th December 1943 certain stores were consumed in the normal course of the company's business. From para 3 of the agreement with the selling agents, exhibit A, (annexed to the affidavit of Robert Adam Brown) it appears that the company agreed that they will not themselves or through their agent sell any sugar manufactured except in accordance with the terms of the agreement. The letter of Commander Dixon and the affidavit of Robert Adam Brown, to which learned counsel has made reference, do not

support the contention made on behalf of the assessee that no business was carried on during the accounting year. On the contrary, these documents support the finding of the Appellate Tribunal that during accounting period the company carried on business even after they had sold the machinery and plant to Dalmia Jain & Co.

55. For the reasons assigned, I agree with my brother Sarjoo Prosad J. and hold that upon the facts of this case the surplus of Rs. 13,05,144 arising out of the sale of the plant and machinery of the sugar factory is chargeable u/s 10(2)(vii), proviso 2 of the Indian Income Tax Act. I would answer the first question of law formulated by the Division Bench in, the above manner. I regret that on this question I have reached a conclusion different from that of my brother Shearer, J. for whose opinion I have great respect.

56. As regards second question, the finding of the Appellate Tribunal is, in my opinion, erroneous, for there is no material upon which the Tribunal could hold that the profit of Rs. 15,882 was made on the sale of the factory stores. From the statement of the case it appears that the sum of Rs. 15,882 represented the difference between Rs. 88,000 which the Income Tax Officer described as "sale proceeds on the basis of expert valuation" and Rs. 72,118 which was the cost of certain stores to the assessee. The Income Tax Officer did not indicate upon what material the assessment of Rs. 15,882 was made and whose expert valuation was accepted. But the Appellate Tribunal stated that the Income Tax Officer really relied upon the stores account opened in the books of Messrs. Dalmia Jain & Co. which showed that the company or some officers of the company had valued the stores at Rs. 88,000/-. But paras 16 and 17 of the memorandum of agreement indicate that with respect to the stores ordered or received by the assessee after the 9th August 1943 Messrs. Dalmia Jain & Co. were to pay nothing more than the cost price, and in consequence, on these stores at least the assessee made no profit at all. Clause (c) of para 19 contained a statement by the purchasers as to how they proposed to allocate the total consideration money of Rs. 28 lakhs between certain specific items, but the stores were not separately valued but were valued along with other property and to the whole a sum of Rs. 2,50,000 was allocated. In my opinion, there was no material upon which the Income Tax Officer could draw the inference that the vendors made profit of Rs. 15,882 on the sale of stores. On the second question of law formulated by the Division Bench I agree with Shearer, J. and hold that the amount of Rs. 15,882 which is alleged to be the profits on the sale of the stores is not taxable under the Income-tax Act in the circumstances of this case.