

# CALCUTTA HIGH COURT

Nanalal M. Varma & Co. (P.) Ltd

Vs

Commissioner of Income-Tax

(Sankar Prasad Mitra and Chatterjee, JJ.)

06.06.1968

## JUDGMENT

### **Sankar Prasad Mitra, J.**

1. This is a reference under Section 66(1) of the Indian Income-tax Act, 1922. The assessment year is 1955-56, the relevant accounting year is the year ending on October 26, 1954 (Sambat year 2010). The assessee is a private limited company dealing, inter alia, in jute and hessian. For the assessment year under reference, the assessee claimed a loss of Rs. 1,50,217 in its jute and hessian account. The assessee conceded that in this account a profit of Rs. 6,29,396 arose in transactions concluded by payment of differences where no actual delivery of goods was either given or taken. There were, however, transactions in which delivery of the goods was effected by exchange of pucca delivery orders (hereinafter called P.D.Os.); in these transactions the assessee suffered a loss ; and after adjustment of the profit aforesaid there was a net loss of Rs. 1,50,217 in the jute and hessian account which the assessee claimed as its loss from the business in jute and hessian.

2. Before the Income-tax Officer the assessee contended that the loss was a business loss as the actual delivery of goods was taken and given by the transfer of "P. D. Os." The Income-tax Officer found that the assessee did not maintain any godown and there was no actual delivery of goods in any case. In the absence of physical delivery the Income-tax Officer held that the loss of Rs. 1,50,217 was a speculative loss and allowed it to be carried forward to be set off against future speculation profits under Section 24(1) of the Income-tax Act, 1922.

3. Before the Appellate Assistant Commissioner the assessee contended, inter alia, that the delivery of P.D.Os. amounted to actual delivery of the goods. In the alternative, the assessee dealt in P.D.Os. themselves as if these P.D.Os. were like share certificates or any other commodity having an intrinsic value. In other words, the contention was that the assessee dealt in the

purchases and sales of P.D.Os. It was stated that each P.D.O. was purchased after payment by cash or by cheque and each P.D.O. was sold and delivered after receipt in cash or by cheque. The Appellaie Assistant Commissioner in his order has considered whether the loss in question could be treated as loss in jute and hessian. He did not come to any definite conclusions. He proceeded to observe in paragraphs 3, 4 and 5 of his order as follows :

" (3) However, it is not necessary to decide on this point for this appeal. Shri Ray's alternative contention was that the appellant dealt in the P.D.Os. themselves as if these P.D.Os. were like share certificates or any other commodity having an intrinsic value ... In other words, the appellant was a dealer in the purchase and sale of P.D.Os, It is stated that each P.D.O. was purchased after payment by cash or by cheque and each P.D.O. was sold and delivered after actual receipt of cash or cheque. There seems to be no prohibition or restriction to such deals. The Income-tax Officer has not considered this aspect of the case in his order. He will now examine the evidence to be produced by the appellant and come to a finding whether the facts just stated are correct or not. If the facts stated are correct then the appellant can be held to be a dealer in the purchase and sale of P.D.Os. In such a case the loss suffered will be a trading loss and not a speculation loss.

(4) For the reasons stated above, I set aside the assessment order with a direction that the Income-tax Officer should do the assessment, again after looking into the account with reference to the view of business dealings discussed above . . .

(5) In the result, the assessment is set aside with a direction to the assessment again in the light indicated above. "

4. The Income-tax Officer thereupon proceeded to make a fresh assessment. He found that the assessee did not have any godown for storing goods: there was no physical handling of jute and hessian : the assessee neither took physical possession of the goods nor did he give physical delivery of the goods : and all that the assessee did was either to receive or part with delivery orders relating to the goods contracted for. The Income-tax Officer examined the specimen of a P.D.O. and found that it merely authorised the mill manager to deliver jute goods to the person concerned and the mill in its turn gave an assurance about the possession of the goods on the date of the issue of the P.D.O. The Income-tax Officer did not accept the contention that the P.D.O. would become a valuable document by itself. He was of the view that a person might be called a trader or a dealer in the goods represented by the P.D.O. or the railway receipt; but there could not be a trade or dealing in the P.D.Os. or the railway receipts taken by themselves. The Income-tax Officer said that under Explanation 2 to Section 24(1) physical delivery of the goods was necessary for taking a transaction out of the definition of " speculative transaction ". Accordingly,

he held that the loss of Rs. 1,50,217 was a speculation loss and had nothing to do with the assessee's business as such.

5. The assessee preferred an appeal against this order of the Income-tax Officer. Before the Appellate Assistant Commissioner (who succeeded the Appellate Assistant Commissioner who made the first order, i.e., the order of remand) the assessee contended that the Income-tax Officer did not appeal against the first order of remand. In the premises, the decision of the (first) Appellate Assistant Commissioner that if the facts stated by the assessee were found to be correct then the assessee could be held to be a dealer in the purchases and sales of P.D.Os. had become final. According to the assessee, the Income-tax Officer in the reassessment proceedings could not have held the loss to be a speculative loss on the ground that no actual delivery of goods were taken or given. The assessee also contended that the delivery of the P.D.Os. was tantamount to the delivery of the goods contracted for. And that view was also accepted by the first Appellate Assistant Commissioner. The Income-tax Officer was, therefore, required only to verify whether the P.D.Os. were transferred on immediate payments by cash or cheque of the full value of the goods. But in his fresh assessment order the Income-tax Officer has not considered this aspect of the case at all.

6. The then Appellate Assistant Commissioner, it appears, agreed with these contentions. He verified certain items of transfers of P.D.Os. himself and found that transfer of P.D.Os. took place only on immediate payments by cash or cheques. He held that the transactions in which the actual delivery of P.D.Os. had been given or taken could not be considered as speculative transactions within the meaning of Explanation 2 to Section 24(1) and the loss claimed by the assessee must be treated as a business loss and set off against other income of the assessee, if any.

7. The Income-tax Officer appealed against this order. At the hearing of the appeal before the Tribunal a preliminary objection was taken on behalf of the assessee to the maintainability of the appeal. It was stated that in the order setting aside the original assessment the Appellate Assistant Commissioner had accepted the principle that P.D.Os. were commodities and had in effect sent the matter back to the Income-tax Officer for verification of the facts and as that order of the Appellate Assistant Commissioner has not been challenged in appeal, his findings had become final. It was stated further that subsequently the Appellate Assistant Commissioner had found that the assessee was a dealer in P.D.Os. and had allowed the assessee's appeal to him. The present appeal to the Tribunal, therefore, it was submitted on behalf of the assessee, did not lie at all.

8. The Tribunal rejected the preliminary objection as to the competence of the appeal. The

Tribunal was of opinion that the order which the (first) Appellate Assistant Commissioner had passed was an order setting aside the assessment: he made certain observations as a guidance to the Income-tax Officer to be followed while refraining the assessment; but these observations were mere obiter and, since the assessment had been set aside, the whole matter concerning the nature of the loss of Rs. 1,50,217 was left open to be reconsidered by the Income-tax Officer. The Tribunal said that on reconsideration the Income-tax Officer once again held that the loss was a loss in speculative transaction and thereafter the (second) Appellate Assistant Commissioner gave the final finding that such a loss was a business loss and had to be set off against the income of the assessee from sources other than speculation. The Tribunal held that it was only after this second order that the department could have a grievance and could appeal against the decision. The previous judgment, says the Tribunal, of the (first) Appellate Assistant Commissioner merely incorporated an observation and not a decision on the issue.

9. On the merits the Tribunal followed the judgment of this court in *D. M. Wadhwana v. Commissioner of Income-tax*, [1966] 61 I.T.R. 154, , and held that the Appellate Assistant Commissioner had erred in holding that the loss suffered in transactions in which the delivery of P.D.Os. had been given or taken was not loss from speculative transactions within the meaning of Explanation 2 to Section 24(1) of the Indian Income-tax Act, 1922. The Tribunal set aside the Appellate Assistant Commissioner's order and allowed the appeal.

10. The following questions of law have been referred to us for opinion ;

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal-was right in overruling the assessee's preliminary objection and holding that the appeal was maintainable ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the loss of Rs. 1,50,217 was a loss from speculative transactions within the meaning of Explanation 2 to Section 24(1) of the Indian Income-tax Act, 1922 ? "

11. So far as the first question is concerned, Mr. Roy appearing for the assessee has advanced more or less the same arguments that were advanced before the Appellate Tribunal. Mr. Roy has said that the first appellate order finally decided the contention that the assessee should be held to be a dealer in P.D.Os., if it be found that all the P.D.Os. were delivered against full consideration. This determination of the Appellate Assistant Commissioner was open to appeal. But the department did not take the matter to the Appellate Tribunal. It is not, therefore, open to challenge in any subsequent proceeding. The Income-tax Officer in the reassessment proceedings had only to take evidence as to whether the P.D.Os. were delivered against payments, The entire case was no longer before the Income-tax Officer. But instead of pursuing the course directed by

the (first) Appellate Assistant Commissioner he was in error in considering other matters and his second decision has been duly reversed by the (second) Appellate Assistant Commissioner, In these circumstances, Mr. Roy submits, the department can no longer argue that the transactions, with which we are concerned, were speculative transactions within the meaning of Explanation 2 to Section 24(1). From this point of view, according to learned counsel for the assessee, the appeal to the Tribunal from the second order of the Appellate Assistant Commissioner was not maintainable.

12. We are unable to accept those contentions on behalf of the assessee. In this judgment paragraphs 3, 4 and 5 of the first order of the Appellate Assistant Commissioner have already been quoted. It appears that the assessee's first contention before the Appellate Assistant Commissioner was that the delivery of P.D.Os. amounted to actual delivery of goods. The Appellate Assistant Commissioner did not reach any final conclusions on this contention. There was an alternative contention of the assessee, namely, that the assessee dealt in the P.D.Os. themselves as if the P.D.Os. were like share certificates or any other commodity having an intrinsic value. In other words, the assessee was a dealer in the purchase and sale of P.D.Os. The assessee's statement before the Appellate Assistant Commissioner was that each P.D.O. was purchased after payment by cash or by cheque and each P.D.O. was sold and delivered after actual receipt of cash or cheque. The Appellate Assistant Commissioner found no prohibition or restriction to such transactions. But since the Income-tax Officer had not considered this aspect of the case, he made an order of remand. His direction to the Income-tax Officer was to make a reassessment after looking into the assessee's account " with reference to the view of business dealings discussed " in his order of remand. In the concluding paragraph of his order also the Appellate Assistant Commissioner repeats : " In the result, the assessment is set aside with a direction to the assessment again in the light indicated above. " It is true that the first Appellate Assistant Commissioner has stated in paragraph 3 of his order that if the facts stated by the assessee were correct then the appellant "can be held to be a dealer in the purchase and sale of P.D.Os. In such a case the loss suffered will be a trading loss and not a speculation loss. " In our view these were mere observations of the Appellate Assistant Commissioner and were not his findings. What he wanted to convey was that, if the facts that the assessee's counsel was stating, namely, (a) the assessee dealt in the P.D.Os. themselves as if these P.D.Os. were like share certificates or any other commodity having an intrinsic value, and (b) each P.D.O. was purchased after payment by cash or by cheque and each P.D.O. was sold and delivered after actual receipt of cash or cheque were correct, the assessee may be held to be a dealer in the purchase and sale of P.D.Os. The Appellate; Assistant Commissioner does not say that the assessee shall be or will be a dealer in P.D.Os. if the facts stated were correct. The expression " can be " used by him, in our opinion, cannot be construed in any other way. The aforesaid view, therefore, of the

Appellate Assistant Commissioner was a mere expression of opinion as opposed to a finding. In these premises, it cannot be urged that the failure of the department to prefer an appeal against this order of the Appellate Assistant Commissioner irreparably prejudiced the department's contentions to the contrary. The department waited for the reassessment directed by the Appellate Assistant Commissioner and thereafter subsequent proceedings had followed; and ultimately the matter has come up to this court. We do not think, in view of what we have stated above, that the department's appeal to the Appellate Tribunal was incompetent.

13. Incidentally, we also intend to observe that, assuming that the first order of the Appellate Assistant Commissioner contained certain finding? against which no appeal was taken, the position would not alter in the least on the facts of this case. In the second order of the Appellate Assistant Commissioner (which we propose to discuss in detail a little later) it has been found (a) that the assessee carries on business in jute and hessian, (b) in that business of jute and hessian P. D. Os. are given and taken and (c) P. D. Os are given and taken against payment in cash or cheque. On these findings the Appellate Assistant Commissioner has come to the conclusion that the transactions in questions were not speculative transactions. The Commissioner was aggrieved by the order and went to the Tribunal by way of appeal. In these circumstances, the appeal could not be held to be incompetent. In other words, the appeal to the Tribunal was maintainable, on the facts of this case, whether or not there were findings about dealings in P. D. Os. in the first order of the Appellate Assistant Commissioner.

14. We now proceed to consider the second question in this reference. From the first order of the Income-tax Officer we find that the assessee had returned a gross loss of Rs. 1,50,217 "under jute & hessian account" (vide page 8 of the paper book). At page 9 the Income-tax Officer says :

"The assessee-company claimed that the loss under jute & hessian account was their business loss, as actual delivery of goods was taken by them. The assessee-company did not maintain any godown and on scrutiny of their account it appears that what the assessee company did, was acceptance of pucca delivery order on contract. Actual delivery of jute goods was never taken and all these contracts were settled on difference basis. The clear intention when the contracts were made was not to take physical delivery of the goods but to settle ultimately on difference basis....."

15. From this order of the Income-tax Officer, therefore, it appears that the assessee claimed the loss not as a dealer in P. D. Os. simpliciter but in its business of jute and hessian. This conclusion of ours is corroborated by other facts which we shall presently deal with.

16. In the first order of the Appellate Assistant Commissioner also (page 12 of the paper book) it

is stated :

" The first contention in this appeal is regarding the treatment of loss in jute and hessian. The appellant was a dealer in jute and hessian. In the course of the business, the appellant purchased and sold pucca delivery orders of jute and hessian. Apart from actual purchase of jute and hessian, the appellant had shown a portion of these transactions under the head difference received and paid ....."

17. These lines from the Appellate Assistant Commissioner's order confirm the statement in the Income-tax Officer's order that the loss was claimed in the business of jute and hessian.

18. It would now be useful to quote a few portions of the order of the Income-tax Officer on the reassessment proceedings. In paragraph 2 of this order the Income-tax Officer has said (page 15 of the paper book):

" The main point in this case is that the assessee claimed a total amount of Rs. 1,50,217 as a loss in jute and hessian ..... The assessee's contention before the learned Appellate Assistant Commissioner was that the assessee dealt in the P. D. Os. In other words, the assessee's claim is that it purchased P. D. Os. and sold P. D. Os. just as any other commodity is purchased and sold by an ordinary trader."

19. Then in paragraph 3 the Income-tax Officer says, inter alia :

" The assessee has been heard after the case has been set aside and its contention is that the P. D. O. is a valuable commodity and even assuming that a P. D. O. is not a document of title and no goods were actually delivered or received it should be held that the assessee was dealing in P. D. Os."

20. In paragraph 5 the Income-tax Officer has stated, inter alia :

" Taken by itself the railway receipt is without worth. The same is the case with the P. D. O. By itself the P. D, O. has no value. It is just a scrap of paper. A person may be called a trader or a dealer in the goods represented by the P. D. O. or the railway receipt. But, obviously, there cannot be a trade or dealing in the P.D.O. or R.R, taken by itself. If they do not represent any tangible goods they represent nothing and they cannot have any value. Further, if the assessee was a dealer in P.D.Os. what prevented it from registering itself as a dealer in the P.D.Os. with the commercial tax authorities ? A copy of the certificate of registration (for commercial tax) taken by the assessee has been ..... placed in the miscellaneous file of 1955-56. This certificate ..... shows that the assessee was registered for re-sale of jute products and some other goods but it

was never registered as a dealer in P.D.Os."

21. The reason why we have quoted the above portions of the Income-tax Officer's order is two-fold. Firstly, we intend to point out that the assessee was all along claiming the loss as a loss in its business of jute and hessian and, secondly, the Income-tax Officer did carry out the directions of the Appellate Assistant Commissioner and did consider on the evidence available to him as to whether the assessee could be described as a dealer in P.D.Os. In other words, the observations against the Income-tax Officer made in the second order of the Appellate Assistant Commissioner do, not appear to us to be justified.

22. We now come to the second order of the Appellate Assistant Commissioner. Here also it is clear that in the assessee's return the loss was shown as a loss in the jute and hessian account (vide paragraph 3 at page 21 of the paper book). In paragraph 5 of this order (at pages 21 and 22 of the paper book) the Appellate Assistant Commissioner has discussed in detail the nature of the assessee's transactions as presented to him on behalf of the assessee. We may, therefore, usefully quote the whole of this paragraph, which runs thus:

" The appellant's representative states first of all that the appellant has two types of transactions in jute and hessian, those in which the contracts for delivery of jute or hessian are settled by payment of differences, that is without giving delivery of the actual goods or P.D.Os., and the other in which the contracts are fulfilled by delivery of P. D. Os. on the due dates. He points out that the former type of transactions, the appellant itself has shown as speculation and argues that the Income-tax Officer is wrong in considering the latter type of transactions also as speculative transactions. As regards the latter type of transactions he explains the course of the transaction to be as follows :

The appellant enters into a contract with a party ' B' for the sale of a specified quantity of a particular type of jute or hessian on a particular date. At the same time or some time later, the" appellant may have contracted to purchase from another party ' C' similar quantity or quality of jute or hessian. On the due date or immediately before the due date, the appellant receives the P.D.O. in respect of the jute or hessian from ' C' for which ' C' is paid the full value of the goods, and endorses the P.D.O. with mate's receipts, etc., to ' B' who pays the appellant the full value of the goods. He points out that here all the parties concerned accept the transfer of the P.D.O. with the mate's receipts as complete fulfilment of the contract and, therefore, the contracts cannot be said to have been ' settled' otherwise than by delivery of the ' commodity' because the holder of the P.D.O. and mate's receipts can on presentation to the mill get actual delivery of the goods. "

23. This paragraph reveals that in certain cases the assessee entered into contracts for sale of jute

and hessian on a particular date but instead of giving physical delivery of the contracted goods, the assessee performed its obligations under the contract by delivery of P.D. Os. The question is whether such transactions are hit by Explanation 2 to Section 24(1).

24. Against the background of the aforesaid findings in paragraph 5 of the order, the Appellate Assistant Commissioner in paragraph 7 of his order (at pages 22 and 23 of the paper book) has stated :

" The appellant's representative finally points out that my predecessor when he set aside the original order had in fact accepted the appellant's contention on this point and that in setting aside the original order, the only matter he wanted the Income-tax Officer to verify was whether, as stated by the appellant, pucca delivery orders were transferred on immediate payment by cash or cheque of the full value of the goods, and that in his assessment order,, the Income-tax Officer is absolutely silent on this point. In my opinion, there is force in this contention of the appellant's representative. As the Income-tax Officer has not examined this point, I have myself verified a few items of transfers of pucca delivery orders selected at random and have found that transfers of pucca delivery orders take place only on immediate payment by cash or cheque. I hold therefore that these transactions in which actual delivery of pucca delivery orders have been given or taken cannot be considered as speculative transactions within the meaning of the Explanation 7 of Section 24(1) of the Income-tax Act, and that the loss must be considered as loss in business other than speculation and set off against other incomes, if any. The appeal is, therefore, allowed as above. The Income-tax Officer shall modify the assessment accordingly,"

25. This paragraph of the Appellate Assistant Commissioner's order calls for two comments. Firstly, he is not right in holding that the Income-tax Officer did not take into consideration the directions that the (first) Appellate Assistant Commissioner gave to him. Secondly, he seems to think that a person who enters into a contract for delivery of goods and performs that contract by delivery of P.D. Os, does not enter into a speculative transaction as contemplated by Explanation 2 to Section 24(1). We have to determine on the facts of this case whether he has reached the correct conclusion.

26. Let us quote, at the outset, the relevant provisions in Section 24(1) of the Income-tax Act, 1922. The provisions are as follows :

"24. Set-off of loss in computing aggregate income.--(1) Where any assessee sustains a loss of profits or gains in any year under any of the heads mentioned in Section 6, he shall be entitled to have the amount of the loss set off against his income, profits or gains under any other head in that year :

Provided that in computing the profits and gains chargeable under the head ' Profits and gains of business, profession or vocation', any loss sustained in speculative transactions which are in the nature of a business shall not be taken into account except to the extent of the amount of profits and gains, if any, in any other business consisting of speculative transactions: .....

Explanation 1.--Where the speculative transactions carried on are of such a nature as to constitute a business, the business shall be deemed to be distinct and separate from any other business.

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

27. For purposes of the instant reference the plain meaning of Explanation 2 appears to be that, if a contract for purchase and sale of any commodity is settled otherwise than by actual delivery, it would be a speculative transaction. Now, the expression used is "actual delivery." Delivery, it is well-known, may be actual or constructive. Delivery is constructive when it is effected without any change in the actual possession of the thing delivered, as in the case of delivery by attornment or symbolic delivery. Delivery by attornments may take place in three; classes of cases : first, the seller may be in possession of the goods, but after sale he may attorn to the buyer, and continue to hold the goods as his bailee ; secondly the goods may be in the possession of the buyer before sale but after sale he may hold them on his own account; thirdly the goods may be in the possession of a third person as bailee for the seller, and after sale such third person may attorn to the buyer and continue to hold them as his bailee: vide Chalmers' Sale of Goods Act, 1893, 15th edition, at page 195. In other words, " actual delivery " means real or physical delivery. All other forms of delivery would be constructive or symbolic delivery. The Supreme Court in Bayyana Bhimayya v. Government of Andhra Pradesh, . has expressed this view on the point of time "actual delivery" occurs in transactions involving delivery orders. In paragraph 6 at page 1067 Hidayatullah J. (as he then was) speaking for the Supreme Court observes:

" A delivery order is a document of title to goods (vide Section 2(4) of the Sale of Goods Act), and the possessor of such a document has the right not only to receive the goods but also to transfer it to another by endorsement or delivery. At the moment of delivery by the mills to the third parties, there were, in effect, two deliveries, one by the mills to the appellants, represented, in so far as the mills were concerned, by the appellant's agents, the third parties, and the other, by the appellants to the third parties as buyers from the appellants. These two deliveries might synchronise in point of time, but were separate, in point of fact and in the eye of law. "

28. The Supreme Court has reaffirmed this view in State of Andhra Pradesh v. Kolla Sree

Ramamoorthy, ..

29. These two judgments of their Lordships of the Supreme Court indicate that " actual delivery " (in cases covered by the passing of delivery orders) takes place when the goods are actually delivered to the ultimate endorsee of the delivery order. From this point of view, we are of opinion, that a delivery of a P. D. O. cannot be " actual delivery " within the meaning of Explanation 2 to Section 24(1) in a contract for sale of goods intended to be delivered. A similar view was taken by this court in D. M. Wadhwana v. Commissioner of Income-tax on which the Appellate Tribunal has relied. In this case under certain contracts the assessee had to sell to and purchase from the same party, the same quantity of the specified commodity of which delivery had to be effected by both on the same day. The parties to the contract exchanged P.D.Os. which authorised the assessee and the other party respectively to take delivery of the stipulated number of bales from the mills concerned and drew bills on each other pursuant to the contract. Debit and credit entries for the entire amount in respect of the pucca delivery orders were found in the account books and the bank pass-book of the assessee. The question was whether the net loss incurred by the assessee in these transactions could be set off against the other business income of the assessee under Section 24(1) of the Income-tax Act, 1922. G. K. Mitter J. (sitting with Masud J.) held that, as the exchange of pucca delivery orders amounted only to notional and not real delivery of the goods as contemplated by Explanation 2 to Section 24(1), the transactions were speculative transactions and the loss incurred by the assessee could not be set off against the other business income under Section 24(1). It was held further that the word " actual" in Explanation 2 to Section 24(1) meant" real" as opposed to " theoretical" or " probable ". It was also held that there was nothing in Explanation 2 to Section 24(1) to show that it was intended to apply only to transactions in which there was no actual delivery of goods even at the ultimate stage in a series of chain transactions.

30. Mr. Roy for the assessee distinguishes this case by submitting that G. K. Mitter J.'s decision is in the context of contract for sale and purchase as between the same parties and of the same quantity of specified goods of which delivery had to be effected by both the parties on the same day: but in the instant case there is no finding that the contracts for purchase and sale were in respect of the same commodity with the same parties deliverable on the same date. In this view of the matter, submits Mr. Roy, the Tribunal was in error in applying the judgment of G. K. Mitter J. to the facts in the present reference.

31. We have already quoted extensively the facts found in the second order of the Appellate Assistant Commissioner on the basis of submissions made on behalf of the assessee. Briefly speaking, the facts are that the assessee carries on business of purchase and sale of jute and hessian. In some cases it did not deliver the goods contracted for. It went to the market and

purchased identical goods for which it obtained a delivery order and made over that delivery order to its own purchaser in fulfilment of the contract for sale it had entered into. On these facts the only conclusion is that, so far as actual delivery is concerned, the contracts in question were settled or fulfilled or performed by delivery of P.D.Os. and to these facts the principles laid down by G. K. Mitter J. in Wadhwana's case would, in our opinion, apply.

32. We find that Wadhwana's case was also followed by another Division Bench of our court in Murlidhar Jhunjhunwalla v. Commissioner of Income-tax, [1969] 73 I.T.R. 727 (Appendix).. In this case K. L. Roy J. (with whom Banerjee J. concurred) has held that there must be actual delivery or transfer of the commodity itself in order to take a transaction out of the definition of speculative transactions in Explanation 2 to Section 24(1). K. L. Roy J. has held further that the word " settled " means " determined " or " concluded " or " disposed of". According to Roy J., a contract for sale and purchase of jute may be concluded and/or determined by delivery of P.D.Os; but it would be a case of contract "concluded and/or determined " without actual delivery of the commodity and would be a speculative transaction with the meaning of Explanation 2 to Section 24(1). With this view of the Division Bench we are in agreement. Our attention has been drawn to a judgment of A. N. Ray J. (sitting with D. Basu J.) in Commissioner of Income-tax v. Ram Chandra Gupta & Co., [1968] 69 I.T.R. 254. This decision does not assist us in deciding the points under consideration in this reference. In the case before A. N. Ray J. the finding was that during the relevant previous year the assessee had entered into transactions in gunny bags entailing purchase and sale of delivery orders. The necessary consequence of that finding is that the assessee undertook not to deliver the goods but to deliver the relative delivery orders only which the assessee did. Moreover, Ray J. has said at page 26'0 I " In the present case there is no finding that there was any settlement of the contracts of purchase and sale and therefore one of the vital limbs of Explanation 2 to Section 24(1) of the Indian Income-tax Act is not found as a fact in order to bring the transaction within the mischief of a speculative transaction."

33. In our case the Appellate Assistant Commissioner in his second order has found that the assessee undertook to deliver the goods but purchased delivery orders and made over these orders to its own purchasers to perform its obligations under the contract. In other words, instead of actual delivery of the goods, the assessee settled the contracts by delivery of P.D.Os. In these premises, the assessee's transactions were speculative transactions within the meaning of Explanation 2 to Section 24(1).

34. The answers to the questions framed in this reference are, therefore, as follows;

Question No. 1      ...      Yes.

Question No. 2 ... Yes.

35. The assessee will pay to the Commissioner his costs of this reference.

Chatterjee, J.

36. I agree.