BOMBAY HIGH COURT

J.S. Parkar

Vs

V.B. Palekar

(D Deshpande, C.J. Mukhi and V Tulzapurkar, JJ.)

27.04.1973

JUDGMENT

Deshpande, C.J.

1. Facts giving rise to this application under articles 226 and 227 of the Constitution are few and simple, though the case appears to involve great hardship and consequently calls for close scrutiny and analysis. The petitioner (assessee) was carrying on business of transporting iced fishes, mangoes and other goods by sea from Konkan ports to Bombay. He was the owner of a launch "Lakshmi". On 24th April, 1961, the Central Excise authorities seized 4,999 biscuits of gold weighing 10 tolas each from the said vessel. The Collector of Central Excise investigated the case and ultimately confiscated the gold so seized by order dated September 18, 1961. The assessee and some others were then tried before the Special Judicial and Additional Chief Presidency Magistrate, Bombay, for offences under section 120B of the Indian Penal Code and section 167(81) of the Sea Customs Act, 1878, and section 23 of the Foreign Exchange Regulation Act of 1947. At the conclusion of the trial the assessee and some other accused were convicted by the learned Magistrate for these offences on July 22, 1963. The said convictions and sentences were confirmed by this High Court on August 11, 1964. Appeal of the assessee and others to the Supreme Court in Criminal Appeal No. 233 of 1964 was ultimately dismissed by the said court on 6th November, 1968.

2. In the meanwhile, the assessee submitted his return of income for the year 1962-63 on September 1, 1962. Therein he disclosed his income from property, share of profit from the firm of Messrs. Parkar Navigation and Company, Messrs. Deogad Fisheries and Messrs. Parkar Brothers. He also disclosed his salary income which he received from Messrs. Parkar Navigation Company and dividend income of his shares. In response to the notice of the Income-tax Officer, 'B' Ward, Kolhapur, under section 143(2) of the Income-tax Act, 1961, the assessee appeared before the said officer through his advocate and produced before him cash book and ledger. In

the course of the assessment proceedings, the Income-tax Officer seems to have learnt about the seizure of gold to the tune of 49,990 tolas from the assessee's launch on 24th April, 1961, and conviction of the assessee along with others before the Special Magistrate. The assessee, therefore, appears to have been called upon to explain the possession of such gold and the sources of money that was required for investment in such huge quantity of the gold. The assessee seems to have submitted his statement in short on July 27, 1966, in the form of a letter. The sum and substance of the contents of his say in this letter is that the criminal case against him then was pending before the Supreme Court and that he was falsely involved in the case and the witnesses examined in the said trial had given false evidence. He concluded his letter saying :

"..... as far as income-tax matters are concerned, in the absence of any proof that I did possess the gold attributed in the case, the department cannot tax the amount in my case as the onus to prove one way or the other is on the department."

3. Along with this letter, among others, he enclosed a copy of the judgment of the Special Judicial and Presidency Magistrate in Case No. 140/W of 1963 dated July 22, 1963, and his written statement before the said Magistrate.

4. The Income-tax Officer then passed assessment order dated February 13, 1967, assessing the total income of the assessee under section 143(3) of the Income-tax Act to the tune of Rs. 70,98,834, Rs. 70,78,584 having been added towards income by way of "investment in acquisition of gold as income from undisclosed sources as discussed above". He referred the question of penalty to the I. A. C., P. R. II, Poona. On appeal by the assessee to the Appellate Assistant Commissioner the findings recorded by the Income-tax Officer were virtually confirmed. However, the value of the gold involved in the alleged investment was reduced from Rs. 70,78,584 to Rs. 47,19,056. He directed penal proceedings to be initiated separately under section 271(1)(c) of the Income-tax Act. As a result of the slight relief granted in appeal the total income was reduced by Rs. 23,59,528. The assessee's appeal to the Income-tax Appellate Tribunal was dismissed on 9th March, 1970. The assessee then seems to have made an application for reference to the High Court under section 256(1) in regard to certain questions of law referred to in Paragraph 21 of the Tribunal's order. This application was rejected by the Tribunal on 10th February, 1971. Instead of making an application to the High Court under section 256(2) of the Income-tax Act, the petitioner has filed this writ petition under articles 226 and 227 of the Constitution to this court on 15th June, 1971.

5. Mr. Albal, the learned advocate, appearing for the petitioner, contended, firstly, that the assessment order could not have been founded on the judgments and the evidence produced before the criminal court. He, secondly, contended that even if the Income-tax Officer is found to be justified in relying on such material, the same falls short of proving the ownership of the

assessee of the gold involved in the said smuggling and as such the value of such gold can under no circumstances be treated as undisclosed income of the assessee. He, thirdly, contended that the findings recorded by the income-tax authorities are based on gross violation of the principles of natural justice inasmuch as the witnesses examined before the criminal court, particularly Dhuri and Tarkar, were not examined before the Income-tax Officer who had turned approvers. Nor the petitioner was permitted to be examined in support of his case nor the said two witnesses were allowed to be cross-examined. He fourthly, contended that the income-tax authorities themselves are not clear whether the facts of the present case attracted the provision of section 69 or section 69A of the income tax Act. According to Mr. Albal, section 69A could have no application to the assessment year of 1962-63 when the section itself was inserted in the statute by the Finance Act of 1964, with effect from 1st April, 1964, and section 69 can have no application whatsoever even on the facts found by the criminal courts or the Income-tax Officer, as there is not a tittle of evidence to suggest that the assessee had made any investment whatsoever in the gold. He, fifthly, contended that, in either case, when admittedly the smuggled gold has been confiscated by the Excise and Customs authorities, the assessee was entitled to set off the loss consequent on such confiscation of gold against the alleged undisclosed income.

6. Mr. Hajarnavis, the learned counsel appearing for the revenue, raised a preliminary objection to the

entertainment

of this petition under articles 226 and 227 of the Constitution. According to Mr. Hajarnavis, the Income-tax Act provides for the alternate remedy under section 256(2) for approaching the High Court requiring the Appellate Tribunal to state the case and refer it in the event of the Tribunal declining to refer in exercise of its powers under sub-section (1) of section 256 of the Act. Mr. Hajarnavis contends that no case has been made out by the petitioner for by-passing the said alternate remedy and invoking the extraordinary jurisdiction of this High Court under articles 226 and 227 of the Constitution.

7. The preliminary objection of Mr. Hajarnavis need not detain us for long. It is true that it was open to the petitioner to make an application in forma pauperis, if the petitioner was really unable to pay the court-fees of Rs. 7,500. This apart, the averments in the petition are far too inadequate to satisfy us that in fact the petitioner was unable to pay the court-fees and as such was incapable of availing of the alternate remedy under section 256(2) of the Act. No satisfactory averments are to be found in the application to indicate that the alternate remedy could not have been efficacious or otherwise there was any impediment for the petitioner in availing of the same. The Act also does not require the assessee to pay the tax before availing of the remedy provided in the Act. However, it is by now settled law that existence of alternate remedy by itself does not

amount to an absolute bar to entertainment of the petition under articles 226 and 227 of the Constitution of India. Citizens are entitled to come to this court and invoke its extraordinary jurisdiction where the impugned orders involve a question of patent lack of jurisdiction, or the question of gross violation of the principles of natural justice, or the question of deciding the vires of the Act or the Rules, or where the impugned order seeks to levy or collect some amount from the citizens without the authority of any law.

8. While entertaining such applications the court will certainly bear in mind the fact that alternate remedy did exist and could have been availed of. The High Court also will not readily encourage any citizen to bypass the alternate remedy and rush to invoke its extraordinary jurisdiction. These, however, are mere factors to be considered while exercising the discretionary powers possessed by the High Court under these articles. If any authority is need, it will be sufficient to make reference to the judgments of the Supreme Court in Champalal Binani v. Commissioner of Income-tax, Joharmal Murlidhar & Co. v. Agricultural Income-tax Officer, Assam, Calcutta Discount Co. Ltd. v. Income-tax Officer and K. P. Varghese v. Income-tax Officer.

9. As stated earlier, the present one appears to us to be a very hard case. The gold sought to be smuggled has been confiscated. Apart from the penalty imposed under the Sea Customs Act, the petitioner has also faced other penal consequences provided under the several enactments. Proceedings under the Income-tax Act for the income which, according to the income-tax authorities, was concealed by him and appears to them to have been used for purchasing the said gold, in the circumstances, appear to be very harsh. The hardship involved is too apparent to require any discussion. It also appears that before this special civil application was admitted, notice before admission was given to the State on July 19, 1971, and the rule was granted only after hearing the other side on August 2, 1971. We do not think it just and proper to throw out this petition in limine in the peculiar circumstances of this case, after having allowed the petition to remain pending here for about two years.

10. Coming now to the first contention of Mr. Albal, with regard to the Income-tax Officer's reliance on the proceedings and the judgments in the criminal courts, we find little substance in it. It is now well-settled that the provisions of the Evidence Act do not apply to the proceedings before the Income-tax Officer. It will be sufficient to make reference to the judgment of Chief Justice Mahajan of the Supreme Court in Dhakeshwari Cotton Mills Ltd. v. Commissioner of Income-tax. There is also direct authority of the Punjab High where reliance on the judgment of the criminal court by the Income-tax Officer was considered to be perfectly legal. The case is Anraj Narain Dass v. Commissioner of Income-tax. The Punjab High Court relied on its earlier Full Bench decision in the case of Seth Gurmukh Singh v. Commissioner of Income-tax, the ratio of which has been approved by the Supreme Court in the Dhakeshwari Cotton Mills Ltd. case.

No fault, therefore, can be found with the income-tax authorities, if they chose to rely on the proceedings and the judgments in the criminal courts, where the assessee was tries for the same set of facts. The findings recorded in the criminal courts are undoubtedly relevant for deciding the controversies that have arisen in the case.

11. Mr. Albal, however, contends that even if all the facts found by the criminal courts are accepted as correct and evidence relied on by the criminal courts is accepted as true, yet the said material is far too inadequate to hold that the assessee in this case had been the owner of the gold in dispute by purchasing the same from his undisclosed income. Now admittedly there is no direct evidence. It is also equally true that while the petitioner was being tried by the Special Judicial and Additional Chief Presidency Magistrate for offences under section 120-B of the Indian Penal Code, section 167(81) of the Sea Customs Act of 1878 and section 23 of the Foreign Exchange Regulation Act of 1947, the ownership of the gold was not in issue. The only question really, therefore, that requires close consideration is whether the facts found by the criminal court and the material relied on by the said court and consequently by the income-tax authorities furnish such circumstantial evidence from which the petitioner's ownership of the gold in dispute could have been legitimately inferred.

12. Following facts appear to have been held as proved by the income-tax authorities :

(1) On 20th April, 1961, the assessee went to his workshop at Moda Island and instructed his servants to load ballast on launch "Lakshmi" and directed them to proceed towards Bankot the same night.

(2) All the crew members of the said launch were taken to the house of the assessee in the afternoon on that day for taking some instructions.

(3) when the crew members went to the house of the assessee (petitioner) one unknown Muslim was found along with the petitioner in his room. The assessee told them that the launch was to be taken to Bankot side that night and the unknown Muslim was to accompany them. He further told them that at a certain spot another vessel would meet them from which 25 bags will be transferred to the launch "Lakshmi" which bags were to be concealed under the ballast. He further asked them to take back "Lakshmi" launch to Deogad at midnight and come straight to Moda and anchor opposite his workshop, where arrangements would be made to unload the 25 bags. The tindel and crew would report of the arrival of the launch to the customs office the next morning.

(4) In the evening the assessee, Parkar, went to his workshop and satisfied about the arrangements made.

(5) At 11-00 p.m. the crew members were taken to Hambarghat where the assessee was sitting in a black car. The assessee gave them three bags containing coins and told them to deliver them to the launch which was to transfer the bags containing gold.

(6) On April 22, 1961, when the launch was near Janjira light house, an hour after sun-set they saw a vessel coming towards them from the West. Unknown Muslim accompanying the crew of the a launch flashed a torch and the coming accompanying the crew of the launch flashed a torch and the coming vessel too flashed a torch in response. Three bags containing coins were handed over to the other vessel and the 25 bags containing gold were transferred from the vessel to the vessel "Lakshmi".

(7) The launch then proceeded back to Deogad and came to Moda and anchored opposite the assessee's workshop.

(8) In the meanwhile the crew noticed the custom's tony coming towards them. The customs officers arrived, searched the vessel and detected the gold concealed under ballast of the vessel and seized the same.

(9) In this process the unknown Muslim escaped to the shore and the assessee made arrangements to send him in his black car to Gadaiche Pani.

(10) While the investigation was going on, the assessee contacted the inspector and offered him bribe of Rs. 1 lakh to Rs. 5 lakhs and requested him to throw the gold in the sea or retain the same with himself and to save him from disgrace.

The Income-tax Officer took notice also of the previous history of the assessee's case with regard to his business, which he has dealt with in paragraph 3 of his order. It is enough to refer to the fact that the assessee and his brothers started independent business in the year 1948, and purchased five launches for Rs. 2 lakhs from "Lotus Line Ltd." The total fleet of launches at the end of 1949, was 10. This firm was converted into a private limited company in the year 1955 and it owned a building at Sassoin Dock, Bombay. Nominal capital of the company is Rs. 5 lakhs and other capital for consideration other than cash is about Rs. 1,80,000, which is distributed among the Parkar family and relatives.

13. It is from these circumstances found by the income-tax authorities that they arrived at the conclusion that the assessee must have paid the price of the gold that was smuggled in his launch to his workshop at island Moda. They further concluded that the assessee became the owner of the gold, so detected in his launch and seized, by paying the price thereof. They further concluded that the value of the gold not having even been disclosed by the assessee in his return, the same represented his income from undisclosed sources and thus computed his total income to

the tune of Rs. 70,98,834, including the value of the gold. As stated earlier this figure as to the value of gold was reduced in appeal by the Appellate Assistant Commissioner from Rs. 70,73,534 to Rs. 47,19,056.

14. While upholding the main findings of the Income-tax Officer and the order passed in appeal by the Appellate Assistant Commissioner, the Tribunal relied, among others, on the following reasoning :

(1) The plea of the assessee that he was only a carrier of somebody else is without any proof.

(2) The assessee was convicted along with others for knowingly and with the intention to defraud the Government of India of the duty payable on the gold weighing 49,990 tolas of which he acquired the possession by committing the breach of the provisions with regard to the possession and importing of the gold.

(3) If the assessee was merely a carrier, there would have been some evidence to show on whose behalf he was acting or to whom the goods were intended.

(4) Not much importance can be attached to the role played by the unknown and mysterious Muslim. He could have been there only with a view to identify the foreign ship and bring the gold on board the assessee's launch "Lakshmi". He would not have been allowed to slip away by the crew of "Lakshmi" had he really been the owner of the gold, as after being chased by the customs officials, they would have realised that they would have been answerable for the presence of the contraband gold in the launch.

(5) Offer of bribe to the customs officials by the assessee is inconsistent with any other position than that the assessee being the owner of the gold and the assessee's direct interest therein.

(6) The fact remains that the assessee had been found in possession of a large quantity of gold. It was up to him to prove how he paid for it and how it came into his possession.

(7) It is impossible to believe that a foreigner would have handed over such a large quantity of gold without receiving the consideration thereof. The risk involved in smuggling gold is well-known, where the penalty on detection is complete confiscation. It will, therefore, be opposed to all human conduct that an unknown foreigner would have handed over the goods without receiving the price thereof. The natural presumption in the circumstances of the case can only be that the assessee had paid for it.

(8) The assessee had failed to prove the source for this investment and, in our opinion, the department was justified in treating the cost of the gold acquired by the assessee as having come

out of the undisclosed income of the assessee.

15. Mr. Albal, the learned advocate appearing for the petitioner, contended that the material relied on at best may prove the possession of the assessee, but it cannot be sufficient to conclude the finding of his ownership. He, secondly, contended that such possession of the assessee being of a carrier or of a bailee or of some other nature, cannot be ruled out altogether if the way the smuggling activities are carried on in this country on a large scale by the local and the gang of international smugglers through their hireling is taken into account. He, thirdly, contended that the observation of the income-tax authorities that the foreigner would not part with the gold against the risk involved without receiving the price thereof fails to take notice of equally important side of the picture that no purchaser of the gold will part with the money in advance without any guarantee of the foreigner necessarily delivering the gold, after the receipt of the price in advance. He, fourthly, contended that had the amount been paid, as is assumed by the income-tax authorities, the mysterious Muslim, who is admittedly instrumental in bringing the two vessels into contact, would not have returned in the launch after the delivery of the gold to the assessee. He, fifthly, contended that even a bare look at the total amount of income computed during the previous years would militate against the possibility of the assessee having possessed such large amount of money.

16. It is not possible to say that all these contentions of Mr. Albal are without some substance or some merit. If one were to indulge in the realm of possibilities, every circumstance, every fact, every instance is pregnant with variety of possibilities. However, a court or tribunal or a statutory body invested with the duty and obligation to weigh the materials before it and record findings with regard to the controversial questions, is required to weigh such materials on the test of probabilities rather than on the test of remote possibilities. It is the material on the record, and that material alone, which can afford guidelines for the quasi-judicial authority like the Income-tax Tribunal to arrive at its conclusion. While it is not permissible for him to speculate and conjecture against the assessee, it is also not possible for him to indulge in the realm of remote possibilities in his favour without finding any basis for any such contingency from the material in his possession. While, therefore, it is true that the possession by the assessee of the large quantity of gold can be explained on more than one hypothesis, the Income-tax Officer is under a statutory obligation to decide the implication of such possession on the test of probabilities from the material placed before him or the material collected by him.

17. Here again, while considering these contentions of Mr. Albal, two material circumstances cannot be lost sight of. Firstly, while exercising the jurisdiction under articles 226 and 227 of the Constitution of India, the High Court's power to review the evidence or interfere with the findings of fact is extremely limited. It is not permissible for the High Court to weigh, assess and

appraise the evidence, as if it is hearing an appeal against the order of the income-tax authorities. The second major difficulty in the way of considering the contentions raised by Mr. Albal is that the assessee has not at all chosen to explain this possession of gold with him. We have already referred to the letter of the assessee to the Income-tax Officer dated July 27, 1966. That appears to by the only explanation offered by the assessee. The averments made therein do deny everything, including possession of the gold by him that was seized from his launch. It is not possible to ignore the fact that true facts with regard to the gold found and seized from his launch are exclusively within the knowledge of the assessee himself. He alone could have shed light how smuggling activities are carried on and how his possession could be of a mere carrier or of a person other than the owner. He did not care to file any detailed statement seeking to explain the circumstances conclusively found against him; even the claim of being a mere carrier is left by him for his advocate to argue. He alone could have explained how such huge quantity of gold could come into his possession without payment of the price thereof and what role the unknown Muslim has actually played. Had he chosen to make a statement on oath, the Income-tax Officer could have elicited necessary materials from him to explain the gap between the income shown in his earlier returns and the amount of income from undisclosed source. If the assessee deliberately chose not to open his mouth and disclose how he happened to come in possession of such huge quantity of gold, the Income-tax Officer had to proceed and come to his own conclusion on the material in his possession. It is true that the assessee's failure to explain may not by necessarily conclusive or decisive. But the Income-tax Officer cannot abandon his statutory duty to reach such conclusion as the materials permit without indulging in speculation on either side.

18. It is against this background of these facts and circumstances that we will have to consider the objections of Mr. Albal. The circumstances relied on by the income-tax authorities indicate the lead, initiative, drive and over all control of the assessee. His conduct in offering bribe to the tune of Rs. 3 lakhs and asking the inspector even to throw the gold indicate the extent of his disposing power over the gold seized. If from these facts and from the deliberate omission by the assessee to explain the same, ownership of the gold is held as proved, no fault can be found with such finding or the observation made by him. Inadequacy of evidence is not a relevant point while exercising writ jurisdiction. It is impossible to hold that the view taken by the income-tax authorities could not have been taken, or it is not supported by material, or it is arbitrary or capricious. In the facts and circumstances of this case, such inferential finding is a finding of fact and does not admit of any interference in exercise of writ jurisdiction.

19. Mr. Hajarnavis drew my attention to the following observation made by the Supreme Court in the judgment of Maqbool Hussain v. State of Bombay :

20. Now, it is true that the context in which this observation is made is slightly different. It is also true that what is observed here is a substance of what section 110 of the Evidence Act says. Mr. Albal contends that when the Evidence Act is found not to have any application to the proceedings before the Income-tax Office, observations based on any provisions of the Act also equally would not have any application for determining the implication of the possession of the assessee. It has, however, to be noted that the above observation of the Supreme Court is not based so much on the provisions of section 110 of the Evidence Act, as on the basic principles of jurisprudence. This apart, every court or tribunal or statutory body invested with the duty of ascertainment of the facts is entitled to assume that apparent set of facts is true and the burden to show that the same is not so always lies on the person who is interested in asserting so. If, therefore, in this case the assessee chose to deny the factum of possession, and thereby prevented himself from explaining the circumstances in which he came into its possession, it is not possible to find any fault with the finding of the income-tax authorities that the assessee was the owner of the said gold. The second contention of Mr. Albal, therefore, appears to me thus unacceptable.

21. Coming now to the third contention of Mr. Albal, there is very little material on the record of the case to support his contention. It is not in dispute that the assessee was called upon to appear and put his case as required under section 143 of the Income-tax Act of 1961. It is not disputed that the only statement that he made before the Income-tax Officer is the one made by him in his letter dated July 27, 1966. It is not disputed that he never offered himself to be examined as his witness. Mr. Albal, however, contends that the Income-tax Officer should have himself examined all the witnesses afresh who were examined in the criminal court. Mr. Albal could not support his contention by any authority or by any provision of law. The contention loses all its force once it is found that the Evidence Act does not apply to proceedings before the Income-tax Officer. A grievance, however, appears to have been made before the Tribunal that he wanted to cross-examine two witnesses who had turned approver and whose evidence was relied on by the criminal court and consequently by the Income-tax Officer. Mr. Hajarnavis promptly repudiated the factual aspect implicit in this grievance of Mr. Albal and contended that before the Income-tax Officer no application whatsoever was made for enforcing the attendance of these two witnesses for cross-examination. He even offered to show the record of the proceedings before the Income-tax Officer and challenged Mr. Albal to show from the said proceedings when and where and at what state such an application was made. Mr. Albal, however, contended that absence of any written application or written record in the proceedings before the Income-tax Officer does not necessarily mean that no such application was orally made to the Income-tax Officer. Assessment order of the Income-tax Officer does not refer to any such request. Our attention was drawn by Mr. Albal to page 50 of the paper book, where the relevant observation of the Appellate Assistant Commissioner of Income-tax appears. All that is referred to in this portion of the order is the request of the assessee for re-examination of these two witnesses. Even

in his memo of special civil application to this court, we do not find any specific averment that on any particular date or on any particular occasion any request for cross-examination of any witness was made. Our attention, however, was drawn by Mr. Albal to question No. 3, which he wanted the Tribunal to refer to the High Court. Even otherwise, grievance of not being allowed the cross-examination appears to have been made before the Tribunal for the first time. Such grievance for the first time before the Tribunal on any application for reference to the High Court Cannot be taken into account as being the grievance of the petitioner before the Income-tax Officer and if no grievance can be found to have been made before the Income-tax Officer with regard to prayer for cross-examination being denied to him, it cannot be said that the principles of natural justice have been violated. Mr. Albal drew our attention to paragraph 6 of the order of the Appellate Assistant Commissioner, wherein the petitioner has repeated his grievance that Tarkar and Dhuri should have been examined by the Income-tax Officer, and "if necessary the appellant should have been allowed to cross-examine them on specific points". He, thus wanted to cross-examine only, if necessary and only in the event of these witnesses being examined by the Income-tax Officer.

22. There seems to be some justification for the contention of Mr. Albal that the order of the three authorities disclose some confusion about the application of section 69 or section 69A of the Income-tax Act to the facts of this case. The Income-tax Officer has not referred to any section as such but has merely stated in assessment order that "Rs. 70,78,584 amounts to 'investment in acquisition of gold as income from undisclosed sources discussed above'." This indicated that presumably the Income-tax Officer had section 69 in his mind when he passed the assessment order. In the arguments by the representative of the revenue before the Appellate Assistant Commissioner and also before the Tribunal Extensive reference is made to section 69A and the order of the Appellate Assistant Commissioner indicated that he had section 69A in his mind, as he has in terms referred to that section in paragraphs 9 and 11 of his judgment. The Tribunal has not made any reference to either of these sections but in the affidavit filed in this court by the Income-tax Officer on 15th March, 1972, it is contended that section 69A can have no application whatsoever to the facts of the case. We do not think that this controversy is of any practical importance fort the purposes of the present case. Left to myself, I would be content to rely on section 69A of the Act. It is true that section 69A was brought on the statute book for the first time with effect from 1st April, 1964, and was not in existence during the period of the assessment year. But, to my mind, both sections 69 and 69A are rules of evidence and as such will be applicable to any proceedings if they happen to be on the statute book on the date when the trial takes place. It is not disputed that at the time of the trial, section 69A was in existence and as such the proceedings before the Income-tax Officer can legitimately be claimed to have been governed by this rule of evidence incorporated in section 69A of the Evidence Act (sic). Rules of evidence ordinarily pertain to the domain of adjective law as laid down in the judgments

of the Supreme Court in Sajjan Singh v. State of Punjab and Izhar Ahmad Khan v. Union of India. Petitioner having been found to be the owner of the bullion (gold), value thereof can be presumed to be the income from the undisclosed sources during the said year as provided under section 69A of the Act. Mr. Albal drew our attention to the judgment of the Kerala High Court in the case of Hajee K. Assainar v. Commissioner of Income-tax. It is unnecessary to discuss the facts of this case inasmuch as the Division Bench of the Kerala High Court in that case was dealing with a provision which affected both procedural and substantive rights. The ration of that decision, therefore, will not be applicable to the facts of this case.

23. It is then contended that, admittedly, the entire gold has been confiscated by the customs department and, as such, value of this should have been treated as a trading loss and the assessee was entitled to a set-off of this loss against his assumed and assessed income from undisclosed sources. Reliance was mainly placed on section 71, though faintly section 70 was also referred to. This point was raised before the Tribunal. The Tribunal, however, declined to entertain this plea, as it was raised for the first time before it and it thought that the same cannot be adjudicated without investigation of further facts. Unfortunately, the order of the Tribunal is not explicit as to in what manner investigation of further facts was necessary. It is, therefore, not possible to know if the Tribunal was reluctant to allow set off for loss tainted with patent illegality, against the income source of which was not shown to be illegal or it treated the loss by confiscation as capital loss and, therefore, was reluctant to deduct the same from the income from capital gains as required under section 71. Be that as it may, I have no hesitation in saying that if it were a pure question of law capable of being adjudged on the material on record, the Tribunal was under a statutory obligation to entertain and decide the same. I, however, think that, on the admitted facts, the petitioner is not entitled to claim any set-off. The loss suffered by the assessee consequent on the confiscation of the gold for infraction of law cannot be said to be a commercial loss liable to set off under any provision of the Act. It will be enough to refer to the judgment of the Supreme Court in Haji Aziz and Abdul Shakoor Bros. v. Commissioner of Income-tax. The Supreme Court upheld the view of this court in the same case. Dates were imported from abroad by the assessee in contravention of the provisions of the Sea Customs Act. The customs authorities confiscated the goods under section 167-B of the Sea Customs Act. It, howsoever, gave the assessee, under section 183 of the Act, an option to pay the fine in lieu of confiscation and get the goods released. The assessee exercised the option and got the goods released on payment of fine. In the course of the assessment proceedings the assessee claimed deduction of this penalty amount under section 10(2)(xv) of the Indian Income-tax Act 1922. The Bombay High Court negatived the claim holding that the penalty for infraction of law does not amount to any expenditure laid out or expended wholly and exclusively for the purpose of such business, profession or vocation. The Supreme Court affirmed the said view of this court on slightly broader base, observing as follows :

"An expenditure is not deductible unless it is a commercial loss in trade and a penalty imposed for breach of the law during the course of trade cannot be described as such. Infraction of the law is not a normal incident of business and, therefore, only such disbursements can be deducted as are really incidental to the business itself. They cannot be deducted if they fall on the assessee in some character other than that of a trader."

24. Their Lordships of the Supreme Court referred to several English cases in support of their conclusion. Reliance was place by the learned judges on the following observations of Rowlatt J. in the case of Commissioners of Inland Revenue v. E. C. Warnes and Co. Ltd. :

"but is seems to me that a penal liability of this kind cannot be regarded as a loss connected with or arising out of a trade. In think that a loss connected with or arising out of a trade must, at any rate, amount to something in the nature of a loss which is contemplable and in the nature of a commercial loss. I do not intend that to be an exhaustive definition, but I do not think it is possible to say that when a fine - which is what the penalty in the present case amounted to - has been inflicted upon a trading body, it can be said that that is a 'loss connected with or arising out of' the trade within the meaning of this rule."

25. The learned judges also relied on a page from the speech of Lord Sterndale at page 566 in Von Glehn's case :

"During the course of the trading this company committed a breach of the law. As I say, it has been agreed that they did not intend to do anything wrong in the sense that they were willingly and knowingly sending these goods to an enemy destination; but they committed a breach of the law, and for that breach of the law, they were fined. That, as it seems to me, was not a loss connected with the business, but was a fine imposed upon the company personally, so far as a company can be considered to be a person, for a breach of the law which it had committed. It is perhaps a little difficult to put the distinction into very exact language, but there seems to me to be a difference between a commercial loss in trading and a penalty imposed upon a person or a company for a breach of the law which they have committed in that trading. For that reason I think that both the decision Rowlatt J. in this case, and his former decision in Commissioners of Inland Revenue v. E. C. Warnes and Co Ltd., which he followed were right, and that this appeal should be dismissed with costs."

26. These observations approvingly quoted by the Supreme Court in its judgment by themselves are sufficient to dispose of the assessee's claim for set-off for the loss suffered on account of confiscation of the gold. Mr. Albal, however, drew our attention to the judgment of the Punjab High Court in Commissioner of Income-tax v. Piara Singh. Observed the learned judges :

"As the hazard of losing the money with which the gold had to be acquired was inherent in the activity, any confiscation of that amount would be a loss and thus allowable deduction within the meaning of section 10(1)."

27. In that case Piara Singh was found to be indulging in gold smuggling activities and a sum of Rs. 65,500 was seized from his person while he was on his way to Pakistan to meet a Pakistani smuggler who was to deliver gold to the assessee. This amount was confiscated, and a penalty also was imposed by the Collector of Central Excise and Land Customers. The income-tax authorities proceeded thereafter against him to assess tax on Rs. 65,500 as being the income from undisclosed sources. The Tribunal accepted the claim of Piara Singh that confiscation of this amount amounted to loss and its view was confirmed by the Punjab and Haryana High Court on the above basis. The discussion at page 682 indicates that reliance was entirely placed by the learned judges on the ration of the judgment of the Gujarat High Court in Commissioner of Income-tax v. S. C. Kothari. The judgment in Kothari's case, however, is authority only for the proposition that illegality of any business is irrelevant for the purpose of computing profits or losses thereof. While the revenue is entitled to assess the income-tax on the income of the assessee earned even in unlawful business, the assessee also is entitled to insist on deduction of the losses arising out of such unlawful business. The Gujarat High Court had no occasion to consider whether the loss suffered by way of penalty or confiscation of goods amounts to deductible loss or not. There was an appeal to the Supreme Court in this case and its judgment isCommissioner of Income-tax v. S. C. Kothari. The learned judges of the Supreme Court approved the passage quoted by the Punjab High Court at page 682 of its judgment. The following passage from the judgment of the Supreme Court would shed light on the propriety of making any distinction between the deduction claimed under section 10(2) for expenses incurred and deduction claimed for losses suffered in the course of business under section 10(1) and also deductions claimed by way of set-off under section 24 of the 1922 Act :

"Now, while section 10(1) of the Act of 1922 imposes a charge on the profits or gains of a business it does not provide how these profits are to be computed. Section 10(2) enumerates various items which are admissible as deductions. They are, however, not exhaustive of all allowances which; can be made in ascertaining the profits of a business taxable under section 10(1). It is undoubtedly true that profits and gains which are liable to be taxed under section 10(1) are what are understood to be such under ordinary commercial principles. The loss for which the deduction is claimed must be one that springs directly from the carrying on of the business and is incidental to it. If this is established the deduction must be allowed provided that there is no provision against it, express or implied, in the Act. (See Badridas Daga v. Commissioner ofincome-tax). In that case loss sustained by the business by reason of embezzlement by an employee was held to be an admissible deduction under section 10(1)

although it did not fall within section 10(2)(xi) of the Act of 1922. Indeed, profits cannot be computed without deducting the loss and permissible expenses incurred for the purpose of the business."

A little later the learned judges observed :

"It is the net profit after deducting the outgoings that can be brought to tax. It certainly seems to have been held and that view has not been shown to be incorrect that so far as the admissible deductions under section 10(2) are concerned they cannot be claimed by the assessee if such expenses have been incurred in either payment of penalty for infraction of law or the execution of some illegal activity. This, however, is based on the principle that an expenditure is not deductible unless it is a commercial loss in trade and penalty imposed for breach of the law during the course of the trade cannot be described as such. Penalties which are incurred for infraction of the law are not a normal incident of business and they fall on the assessee in some character other than of a trader."

28. Applying this test laid down by Groves J., speaking for the Supreme Court, in S. C. Kothari's case, and the test laid down by Kapur J., speaking for the Supreme Court, in the case of Haji Aziz and Abdul Shakoor Bros., it shall have to be held that confiscation of goods incurred for infraction of law cannot be said to be a normal incident of business and loss suffered therefrom falls on the assessee in some character other than that of a trader. It is not possible to see how this principle can make any difference where the business itself is found to have been prohibited by the law. It is the commercial profit that is taxable and it is the commercial loss in trade in regard to which deduction can be claimed either because it goes to lessen the amount of profits before the quantum of net profit is determined or because the expenses are required do be incurred for the purposes of running the said business or because losses are incurred under some other sources of business under the same head or they are incurred while carrying on business or vocation under some other head. Penalty and confiscation of goods, even when incurred or suffered in the course of prohibited trade or business still cannot be said to be the normal; incident even of such; unlawful business and the loss so suffered can still be not said to be a commercial loss in the trade for the same reason as gains of theft, dacoity, misappropriation or cheating cannot be treated as taxable income from any business or commerce. The claim of Mr. Albal for deduction of value of gold confiscated by way of set-off cannot, therefore, be entertained.

29. It is true, as observed by the Punjab and Haryana High Court in Piara Singh's case, the risk of confiscation of goods and incurring of penalties is inherent in any unlawful trading or business. So is the risk of conviction and fine. It does not, however, necessarily follow that every kind of damage suffered in such trading falls under the category of commercial loss. It shall have to be

held, at any rate, on the authority of the Supreme Court in Haji Aziz and Abdul Shakoor Bros. that the confiscation of property or penalty incurred while indulging in prohibited trading activities does not amount to commercial loss though it happens in fact to; be a loss according to the ordinary meaning of the word "loss" as understood in common parlance. Attempt to distinguish the above Supreme Court judgment on the ground than the court was dealing with the claim of the assessee for deduction of penalty under section 10(2)(xv) and not under section 10(1) of the Income-tax Act of 1922 is an exercise in futility. That, in the above case, neither the assessee claimed deduction of such penalty by way of loss under section 10(1) of the Act, nor the Supreme Court considered it worth-while allowing the claim under that sub-section is also indicative, if not decisive, of the untenability of such connection. Though deduction was claimed under section 10(1) of the Act, rejection of the claim is based on the broader basis that penalties and confiscations are not the normal incidents of business and do not constitute commercial loss. If one examines the scheme of section 10(2), and section 24 of the 1922 Act and corresponding provisions of sections 28, 29 to 44A and sections 70 and 71 of the 1961 Act, it will be noticed that the provisions deal with the deductions or disbursement from the profits earned under various contingencies. If the losses are incurred in the same business (source of income) under the same head enumerated under section 14, the same are liable to be deducted under section 22 (section 10(1) of the old Act) of the Act. If losses are incurred under a deferent source falling under the same head, the losses are liable to be deducted from the income of any other source falling under the same head under section 70. When, however, net result of all sources under any one head of income is loss, the same is liable to be deducted from the income under another head under section 71. If the net result of all sources under all sources under all heads is a loss, the same can be carried forward under section 72 of the Act. Section 29 to 44A corresponding to section 10(2), clauses (1) to (xvi), deal with deductions or disbursements by way of expenses, etc. These provisions deal with the mode of determining the net taxable profits or income of the assessee. If the true ratio of the Supreme Court judgment is that penalty incurred by infraction of law is not a commercial loss as it is not incidental to trade or business it matters little as to under what count the deduction of set-off is claimed. That the margin between what is and what is not incidental is very thin has been noticed by the learned judges of the Supreme Court themselves. Ratio of this judgment is applicable to all contingencies where such non-commercial loss is sought to be deducted on any count whatsoever. That the assessee in that case claimed deduction of penalty under section 10(2)(xv) cannot make any difference to the ratio of the case. I do not find it possible to agree with the view of the Punjab High Court. I do not think that the Gujarat High Court's judgment in Kothari's case, supports its view. On the contrary, the ratio of the two Supreme Court judgments, run counter to the ratio of the Punjab case.

30. No other point was urged before us.

31. The result, therefore, is that the rule is discharged.

32. There will, however, be no orders as to costs.

Mukhi, J.

33. I have had the privilege of reading the judgment delivered by my brother, Deshpande J. I regret that I am unable to agree with the conclusions to which he has arrived.

34. The facts which give rise to this writ petition have been lucidly set out by my learned brother and it is, therefore, unnecessary for me to recapitulate them in detail, except in so far as may become necessary for the purpose of the observations which I propose to make and the findings to which I have arrived at after a somewhat anxious consideration of the facts and the legal position obtaining in this matter.

35. It is to be noticed that the basic fact, with which there is no longer any dispute after the judgment of the Supreme Court in the criminal case filed against the petitioner, is that the petitioner was concerned with and had smuggled a large quantity of gold (about 50,000 tolas) into the country by sea with the aid of his motor launch "Lakshmi" and the assistance and/or under the direction of an unidentified Muslim gentleman. It is also no longer in dispute that the offence of smuggling of gold was brought home to the petitioner and his conviction under section 120-B, Indian Penal Code, section 167.81, Sea Customs Act, 1872, and section 23 of the Foreign Exchange Regulation Act, 1947, was upheld by the Supreme Court. The petitioner was sentenced to two years' rigorous imprisonment which sentence, it is to be presumed, he had served out. It is also not in dispute that the 49,990 tolas of gold were confiscated by the customs authorities and personal penalty was also sought to be imposed. The grievance of the petitioner with regard to the assessment procedure arises thereafter.

36. The questions that fall for consideration in this writ petition may now be summarised. The first contention of the petitioner was that the Income-tax Officer who made the assessment relied entirely on the evidence and material contained in the Supreme Court paper-book relating to the criminal case against the petitioner in which ultimately his conviction under the various provisions referred to above was confirmed. The petition has contended that it was not; open to the Income-tax Officer to base his decision solely on the evidence and the materials brought out in the criminal case. It is to be noticed that the question of ownership of the contraband gold was never at issue in the criminal proceeding and it is, therefore, the contention of the petitioner that the finding given by the taxing authorities regarding the petitioner's "ownership" of the contraband gold is based on no evidence at all. It was further contended that what the taxing authorities have done is to have enumerated the ingredients and facts brought out in the criminal

proceedings with regard to the offences for which the petitioner was convicted and which related only to the question of dealing in or bringing into India and possession of the contraband gold and from these so-called "basic" facts an inference is sought to be drawn that the petitioner had somehow paid for the Rs. 70 lakhs worth of gold too the foreign supplier and further that the petitioner must be presumed to be the owner of the gold. The value of the gold is sought to be brought to income-tax under section 69 or section 69A of the Indian Income-tax Act, 1961.

37. It has been the contention of the petitioner, therefore, that unless there was independent and legal proof of the "investment" alleged to have been made by the petitioner in the gold and/or of the petitioner's alleged ownership of the gold, it would be an error on the part of the Income-tax Officer to being the value of gold to assessment. The assessment, it is urged, is, therefore, vitiated.

38. The second main contention of the petitioner has been that even assuming without admitting that the petitioner had been properly found to be the owner of the contraband gold the criminal court and the income-tax authorities had held that the assessee was a person who organised the racket of receiving, procuring and dealing in gold, in conspiracy between himself and other persons, including persons from Dubai, by vessels setting sail from the ports on the Persian Gulf. The argument then goes that if the petitioner then was held to be dealing in gold, the loss occasioned to the petitioner by reason of the confiscation of the contraband gold was a trading loss and the income-tax authorities were duty bound to allow him a set-off under the provisions sections 70 and 71 of the Income-tax Act, 1961. It may be mentioned that the petitioner sought to take up this plea as to set-off before the Tribunal but he was not allowed to do so on the ground that consideration of this point involved fresh questions of fact.

39. There are two more question which arise in this writ petition. Firstly, whether section 69A on which reliance has been placed by the appellate authorities and which admittedly had come into force only from 1st April, 1964, that is to say, after the assessment year, was rule of procedure or a rule of substantive law and whether it could be applied to the instant case and, secondly, whether by reason of not permitting the two approves, Dhuri and Tarkar, to be brought before the Income-tax Officer for cross-examination by the petitioner, rules of natural justice had been violated. Now, as regards these two questions are concerned, I am in respectful agreement with; the finding of my learned brother, Deshpande J., so that these two questions need not detain me any longer.

40. There is, however, a contention raised by Mr. Hajarnavis for the revenue that he present writ petition was no maintainable by reason of the alternate remedy being available to the petitioner under section 256(2) of the Income-tax Act, 1961, which he had, without sufficient cause, not availed of. I shall deal with this contention at the appropriate time.

41. I will now consider the crucial point in the case, viz., whether the inclusion of the value of the contraband gold in the assessment of the petitioner is without authority of law in so far as it is based on no evidence at all.

42. It is to be noticed that after assessing the normal income of the petitioner the Income-tax Officer made the following notation in the assessment :

"Add : investment in acquisition of-gold and income from undisclosed sources as discussed above - Rs. 70,78,584."

43. Mr. Hajarnavis contends that the assessment was not made on the basis of section 69 or 69A but under the charging section. The notation referred to above, in my view, makes it abundantly clear that so far as the Income-tax Officer is concerned, he has sought to base the assessment on the provision of section 69 of the Income-tax Act, 1961, which reads as follows :

"69. Unexplained investments. - Where in the financial year immediately preceding the assessment year the assessee has made investments which are not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of the investments or the explanation offered by him is not, in the opinion of the Income-tax Officer, satisfactory, the value of the investments may be deemed to be the income of the assessee of such financial year."

44. It is also abundantly clear that the Appellate Assistant Commissioner has purported to make his order under the provision of section 69A of the Act, which was added in April, 1964. Section 69A reads as follows :

"69A. Unexplained moneys, etc. - Where in any financial year the assessee is found to be the owner of any money, bullion, jewellery or other valuable article and such money, bullion, jewellery or valuable article is not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of acquisition of the money, bullion, jewellery or other valuable article, or the explanation offered by him is not, in the opinion of the Income-tax Officer, satisfactory, the money and the value of the bullion, jewellery or other valuable article may be deemed to be the income of the assessee for such financial year."

45. So far as the learned Tribunal is concerned, while it did not refer to any action, it observed that "the Appellate Assistant Commissioner had held that the Income-tax Officer was justified in bringing the tax value of the acquired investment under section 69A of the Income-tax Act, 1961". The learned Tribunal's finding was couched in these words :

"The assessee had failed to prove the source of this investment and, in our opinion, the department was justified in treating the cost of gold acquired by the assessee as having come out of the undisclosed income of the assessee.

It will be noticed that the learned Tribunal not only used the word "investment" but also the word "cost". We were told at the Bar by the learned counsel for the revenue that the word "investment" is not a term of art. Be that as it may, it is nevertheless obvious that, so far as the provisions under which action had been taken by the income-tax authorities to bring in the value of the gold as the income of the assessee, there has been some blurring of perspective. The Income-tax Officer proceeded on the footing that there had been an investment and inferred payment by the petitioner for the acquisition of the gold. The Appellate Assistant Commissioner proceeded on the footing that section 69A applied and that from the facts which had been proved in the criminal proceedings against the petitioner he sought to draw an inference that payment must have been made and that the petitioner was, therefore, proved to be the owner of the contraband gold.

46. To add to the confusion, our attention was invited to the affidavit-in-reply filed by one G. N. Raichur, Income-tax Officer, Kolhapur, who solemnly suggested that :

"It is not correct that the first respondent and/or the Tribunal applied section 69A of the Income-tax Act, 1961, in the present case."

47. Shri Raichur further states that "reference to section 69A if the Income-tax Act is a mistake." But he does not state as to under what section the inclusion of the value of the gold was made in the assessment. Lastly, Mr. Hajarnavis contends that the inclusion of the value of the gold was made under the charging sections.

48. In the view that we have taken, i.e., that section 69A is applicable notwithstanding that is came into force only on the 1st day of April, 1964, this confusion need not detain us any further.

49. It is to be noticed that the scheme of section 69 and section 69A which section 62 may also be read is that before any action can be taken pursuant to the said sections the relevant condition precedent referred to in such section has to be first complied with.

50. So far as section 68 is concerned, the words use are "where any sum is found credited in the books of the assessee....." Section 69 speaks of "where the assessee has made investment....." Section 69A postulates "where in any financial year the assessee is found to be the owner of any money, bullion, jewellery or other valuable article....." In my view, the phraseology used in the three sections goes to show that before the provisions of either of these three sections can be invoked, the condition precedent as to a credit entry, an investment having been factually made

and the assessee having been found to be the owner of any money, bullion, etc., must be conclusively established on evidence.

51. In the instant case it must be inquired as to whether there is evidence on the basis of which the taxing authorities could hold that the petitioner had either made the investment in gold or was the owner of the contraband gold. If there is no evidence and such a finding is based only on surmises and conjectures, then the imposition of the tax would be without the authority of law and liable to be set aside.

52. I will presently show that there is not an iota of evidence on the basis of which the taxing authorities could support their finding that the petitioner had either paid for the gold and thereby made an investment or that the petitioner was otherwise of the contraband so that its value could be, in the absence of a satisfactory explanation from him regarding the source, treated as his income.

53. It is appropriate at this stage to set out what I may call the ingredients on which the criminal courts came to the finding that the petitioner had in conspiracy with others smuggled gold into India and was in possession thereof in contravention of section 120-B, Indian Penal Code, section 167.81 of the Sea Customs Act, 1878, and section 23 of the Foreign Exchange Regulation Act, 1947. It requires to be repeated that the question of ownership was never and could not be in issue in the criminal proceedings. It also requires to be noticed that it is not disputed that no oral or documentary evidence was taken before the taxing authorities. They merely relied on the Supreme Court paper-book and the material collected therein. What is sought to be contended by Mr. Hajarnavis, the learned counsel for the revenue, is that several ingredients (or what the Income-tax Officer calls "important pieces of evidence") which I am about to set out, from the basis on which the taxing authorities could legitimately base an inference, the inference being that the petitioner had paid for the gold and that he was the owner of the gold.

54. The taxing authorities relied on the following "pieces of evidence" to justify the ultimate finding that the petitioner had in fact plaid for the gold and that he was otherwise the owner of the gold :

(1) Direct evidence of witnesses, Dhuri and Tarkar, who had turned approves and who deposed about the taking out of the launch, "Lakshmi", and bringing in the gold by transhipment at sea from another vessel, "Medina", under the direction of the Muslim gentleman who was on board the "Lakshmi".

(2) It was the launch of the petitioner that went out on the voyage.

(3) It was the petitioner's crew who went on the launch, "Lakshmi" and came back stealthily at night with the gold.

(4) It was to the petitioner's workshop at Moda that the launch, "Lakshmi", came back stealthily with the gold concealed under the sand ballast.

(5) It was the two employees of the petitioner, namely, Patankar and Bhatsale, who were waiting at Moda to receive the gold.

(6) The petitioner after the discovery of the contraband gold in his launch made an abortive attempt to bribe the customs officer and requested him to throw the gold into the sea or retain the same with him and save him from disgrace.

(7) The petitioner made an attempt to win over Dhuri and Tarkar as well as one Phalke.

(8) The falsity of the petitioner's theory that he had sent the launch to Bankot for mango transport business.

55. From these "pieces evidence" as also from the reputation of the petitioner as a smuggler for the last many years (on which point independent inquiries were made by the taxing authorities), the Income-tax Officer came to the following conclusion, which may be stated in his own words :

"From some of these important pieces of evidence as narrated above and also the evidence on record the Central Excise authorities and the special court it has been proved beyond reasonable doubt that the assessee did acquire and was beneficially interested in the acquisition of the gold seized. The assessee has failed to explain and prove the source of the acquisition of gold to such a large extent. As held above, the assessee did acquire and was beneficially interested in the gold seized."

56. The learned Tribunal also set out some of the "pieces of evidence" as found by the Special Magistrate and then came to make the following observations :

".... The fact remains that the assessee had been found in possession of a large quantity of gold. It was up to him to prove how he paid for it. It is impossible to believe that foreigner would have banded over such a large quantity of gold without receiving the consideration thereof. The risk involved in smuggling gold is well known where the penalty of detection is complete confiscation. It will be, therefore, opposed to all human conduct that an unknown foreigner would have handed over the goods without receiving the price for it. The natural presumption in the circumstances of the case can only be that the assessee had paid for it...."

57. After making these observations, the learned Tribunal finally concluded that :

"The assessee had failed to prove the source for this investment and, in our opinion, the department was justified in treating the cost of the gold acquired by the assessee as having come out of the undisclosed income of the assessee."

58. Now, it may be observed that it is also on record that an unknown Muslims gentleman was connected with the smuggling of the gold; he was found to be in the company of the petitioner before the launch left Deogad and it is in evidence that he was the person who arranged for the transshipment of the gold form the vessel, "Medina", to the launch, "Lakshmi", at sea and that the came back to Moda. It has been stated that he was actually caught by the customs personnel but subsequently managed to disappear.

59. The question that that, therefore, arises for consideration is whether from the facts referred to by the taxing authorities on the basis of the evidence recorded before the Special Magistrate an inference would legitimately follow that the petitioner had somehow paid for the gold and was beneficially interested in it and was, therefore, the owner for the purpose of the income-tax assessment.

60. Reliance has been placed on an observation in Salmond's Jurisprudence, that "possession is evidence of ownership". It is substantially clear from what has been stated in the pleading hereinabove that in effect the taxing authorities had no material whatsoever which could prove ownership but possession of the petitioner of the contraband gold having been proved, they sought to infer that the petitioner must have paid for the gold, because "possession was evidence of ownership" and further that it has for the assessee to prove that he was not the owner of the contraband gold.

61. In my view, this is precisely where the taxing authorities have gone wrong and by inferring ownership from the finding of possession and wrongly placing the burden of proof on the assessee sought to levy income-tax on the value of the gold.

62. Before I deal with the question of inference and presumption it is appropriate to refer to a few passages from Salmond's Jurisprudence to show that the reference to the observation that "possession is evidence of ownership" is a complete over-simplification.

63. First of all, it should be noticed that there is a radical difference between possession and ownership. This is what Salmond says at page 266 (twelfth edition) :

".... Our discussion of ownership showed that possession differs from ownership in that the former is of temporary duration whereas the later is of a more permanent, ultimate and residuary nature. But possession differs from ownership in another quite different respect. Ownership, as we saw, consists of a combination of legal rights, some or all of which may be present in any

particular instance; and such rights imply the existence of legal rules and system of law.... Whether a person has ownership depends on rules of law; whether he has possession is a question that could be answered as a matter of fact and without reference to law at all....."

64. Again, at page 292 it is stated :

"..... Possession consists basically in a relationship between a person and an object within the context of the society in which he lives, ... Ownership, on the other hand, consists not of a factual relationship but of certain legal rights and is a matter not of fact but of a law....."

65. It would, therefore, appear that after the fact of possession has been proved by evidence in criminal proceedings it was perfectly legitimate for the taxing authorities to rely on that material and also hold for the purpose of assessment, if necessary, that the petitioner was in possession of the contraband gold. Up to this point no exception could be taken, and we have held that that material (found in the Supreme Court paper book) can properly be relied upon by the taxing authorities. But from the point of possession to the ownership the taxing authorities have relied on no material or evidence whatsoever. By a process of surmise and conjecture they have come to hold that the petitioner had somehow paid for the gold and was the owner thereof.

66. It was argued before us that possession being evidence of ownership simpliciter it was for the petitioner to prove that he was not the owner. Reliance was placed by Mr. Hajarnavis for the revenue on the case of Maqbool Hussain v. State of Bombay, where the following observation occurs :

"Once the appellant was found in possession of the confiscated gold the burden of proving that he was not the owner would fall upon whosoever affirmed that he was not the owner."

67. Mr. Hajarnavis argued that, therefore, it was for the petitioner, who asserted that he was not the owner, to prove the fact. Now, it is to be noticed that this observation of the Supreme Court was made in the context of proceedings before the Chief Presidency Magistrate and the question at issue was whether the confiscation of gold could support a plea of double jeopardy under article 20 of the Constitution.

68. It is significant that the observation of the Supreme Court with regard to the burden of proof follow the exact wording of section 110 of the Evidence Act, which reads as follows :

"110. When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner."

69. It is not in dispute that the Evidence Act does not apply to the proceedings before the taxing authorities and, therefore, though they could rely on the material contained in the record and judgment of the criminal case, they could not rely on the said provision of the Evidence Act so as to proceed on the footing that the burden of proof lay on the petitioner to prove that he was not the owner of the gold.

70. As I have stated above, before the taxing authorities could impose a tax in relation to the confiscated gold they were duty bound to comply with the condition precedent set out in section 69 and section 69A of the Income-tax Act. That is to say, it was for the taxing authorities first to prove that there was in fact an investment or that the petitioner was in fact the owner of the gold. This they could only do on evidence and not by inference from facts relevant only on the question of possession or by wrongly placing the burden of proof on the petitioner.

71. It is to be noticed that section 69 and section 69A do statutorily place a burden on the assessee to explain the source of investment or the source of the acquisition of the gold, but that burden can only arise after the initial burden on the taxing authorities of proving the factum of investment or the factum of ownership has been discharged. Sections 69 and 69A can be said to be in the nature of penal or at least onerous provisions and the burden lies on the revenue to prove that the condition precedent laid down, therefore, is satisfied before any order including the value thereof in the assessment can be made.

72. I would appear that there is some confusion in the mind of the taxing authorities that as soon as an assessee is found in possession of gold he must explain the source thereof. My attention has not been invited to any provision of law by which such a primary burden could be placed on the assessee. On the other hand, the initial burden of finding some material however slight, to support a finding of concealed income is always on the department (See Banshidhar Onkarmall v. Commissioner of Income-tax, remarks at page 364).

73. As I have stated above, section 110 of the Evidence Act does statutorily place the burden of proof, in the circumstances set out therein, but only when a matter is being dealt with by a court of law to which the Evidence Act is applicable. It is not in dispute that the taxing authorities are not governed by the Evidence Act.

74. It would not be, therefore, open to the taxing authorities to say, firstly, that as the Evidence Act does not apply to assessment proceedings they are entitled to base the assessment on materials gathered by them from the record of the criminal proceedings and at the same time seek to place on the assessee the burden of proof as to ownership by invoking the provisions of section 110 of the Evidence Act.

75. It has been held by the Supreme Court in Parimisetti Seetharamamma v. Commissioner of Income-tax, that a conclusion recorded by a Tribunal by wrongly placing therein the burden of proof on the assessee could not be supported. In the same case the Supreme Court, while quoting the observations of the High Court that "the burden lay on the assessee in this case to establish that the amounts received were voluntary payments made by the Princess out of love and affection", went on to say that :

"In so observing, the High Court, in our judgment, has committed an error of law. By sections 3 and 4 the Act imposes a general liability to tax upon all income. But the Act does not provide that whatever is received by a person must be regarded as income liable to tax. In all cases in which a receipt is sought to be taxed as income, the burden lies upon the department to prove that it is within the taxing provision. Where, however, a receipt is in the nature of income the burden of proving that it is not taxable because it falls within an exemption provided by the Act lies upon the assessee."

76. Without some statutory provision imposing the burden of proof, it can never be open to the taxing authorities to contend that the very condition precedent on which a taxing provision may operate, can be presumed to arise if the assessee fails to open his mouth and/or fails to produce material and information to rebut the alleged existence of the condition precedent.

77. Now, it is significant that section 69A speaks of "found to be the owner of.... bullion...." It does not say "found to be in possession of gold, etc. would cast an obligation on the possessor to explain its source it could have very well said so without bringing in the concept of ownership and insisting that the assessee must be found to be the owner. Found by who ? Obviously by the Income-tax Officer and it follows that the finding must be on the basis of proper evidence or material proving such ownership.

78. Again, take the case of "investment" under section 69. Could it be validly contended that the department has merely to allege that an assessee has made an investment, say, in house property or in shares or in bounds, without proving the factual existence of such an investmen ? There must be some starting point. It would be all too easy (and apperceive (sic) for an Income-tax Officer to say to an assessee that "your background shows that you have a lot of money. You must have invested it. Now, tell us where you have made the investment and then explain its source. After all this is a matter within your knowledge."

79. In the case before us the burden of proving that an investment had in fact been made (and not recorded in the books) and/or that the assessee was the owner of the bullion was clearly on the department. It cannot be said with any show of reason that from the facts found in the criminal court on which the petitioner was convicted for smuggling gold into India and in which case the

question of ownership was not even in issue that the department could legitimately draw an inference from those facts and the findings relative to importation of gold and possession of gold that the assessee must have made an investment in or paid for the gold and/or was the owner of the gold.

80. In Dhakeswari Cotton Mills case, the Supreme Court enunciated the law as follows :

"In making an assessment under section 23(3) of the Indian Income-tax Act, the Income-tax Officer is not fettered by technical rules of evidence and pleadings, and he is entitled to act on material which may not be accepted as evidence in a court of law, but the Income-tax Officer is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all. There must be something more than bare suspicion to support the assessment under section 23(3)."

81. It may be mentioned here that it was in evidence in the criminal court that three bags of coins had been taken on board the launch "Lakshmi" when it left for its rendezvous with the other vessel and which bags of coins were ultimately transferred to the vessel from which the contraband gold was transhipped to the launch "Lakshmi". It is significant that the Special Magistrate, while dealing with this aspect of the matter, observed that it was not the case of the prosecution that these coins were the price of the gold that was brought because the three bags of coins would be inadequate as the price of such a large quantity of gold as 50,000 tolas.

82. It would appear that the learned Tribunal, while upholding the conclusions of the Income-tax Officer and the Appellate Assistant Commissioner, relied on the following reasoning :

(1) The plea of the assessee that he was not the owner but only a carrier for somebody else was without proof and that if the assessee had in fact been a carrier there would have been some evidence to show on whose behalf he was acting or for whom the contraband gold was intended.

(2) The assessee was convicted by the criminal court for the breaches of the provisions of law with regard to the possession and importation of gold.

(3) The role played by the unknown and mysterious Muslim gentleman who was admittedly on the scene and who had participated in the bringing in of the gold by going out on the launch, "Lakshmi", and establishing contact with the other vessel which brought gold was not of any importance and what was significant was that this Muslim gentleman had been allowed to escape.

(4) Offer of a bribe to the customs officials by the assessee was inconsistent with any other hypothesis than that the assessee was in fact the owner of the gold, and had direct interest in the

same.

(5) Taking into consideration human nature it was impossible to believe that a foreigner would have handed over such a large quantity of gold without receiving payment therefor in advance. The risk involved in smuggling gold is well known where penalty for detection was complete confiscation of the contraband gold, the natural presumption in the circumstances of the case can only be that the assessee had paid for it.

(6) And lastly, the assessee had been found in possession of a large quantity of gold and it was up to him to explain how he came into possession of it and as the assessee had failed to mention the source of this investment the department was justified in coming to the conclusion that the contraband gold has come from the undisclosed income of the assessee.

83. It is only necessary to peruse this form of reasoning to realise that the contention of Mr. Albal, the learned advocate appearing for the petitioner that the finding of the taxing authorities is based purely on conjecture and surmise is borne out. While referring to the Tribunal's reasoning, Mr. Albal pointed out that if natural human conduct was to be taken into consideration then it could be said with equal vehemence that it was impossible for a person in the situation of the petitioner, i.e. a launch owner to produce and pay 47 or 70 lakhs of rupees in advance on the somewhat chancy prospect of the hypothetical foreigner actually; delivering the gold after receipt of the price in advance. Mr. Albal also pointed out that the role played by the mysterious Muslim gentleman has been glossed over to such an extent that the Tribunal has accepted the department's bold argument that (the mysterious Muslim) "was only an ordinary person and could not have been the owner of the gold". The conjectural approach is clearly obvious.

84. Mr. Albal has also contended that if it could be assumed that the petitioner had already paid for the gold and that the mysterious Muslim gentleman was only there to assist in bringing the two vessels together at sea then there was no reason for the Muslim gentleman to have returned in the launch, "Lakshmi" to Moda. If his role was that of a mere helper and assistant then after the transhipment of the gold from the other vessel into the vessel, "Lakshmi", his job was done and he could well have gone with the other vessel. There is substance in Mr. Albal's contentions and I may add that if the Tribunal felt compelled to take into consideration human nature then it should have also taken into account a matter of common report that in these days gold smuggling is organised on a large scale by international gangs with enormous resources capable of absorbing loss in discovery or confiscation in the hands of carriers.

85. I have discussed the "evidentiary" facts in great detail not because any question of evidence by this court can arise; not because the evidence is to be weighed by this court; but to show that whatever facts were proved were of such a nature that from those facts, without anything else, a

legitimate inference could not be drawn that the petitioner had paid for the gold or that he was the owner of the gold.

86. Mr. Albal, the learned advocate for the petitioner, has drawn our attention to a judgment of the Supreme Court in Mehta Parikh & Co. v. Commissioner of Income-tax, where the question as to the scope of inference from findings of facts has been discussed. That was a case with reference to high denomination notes of Rs. 1000 each and the assessee had claimed that on the relevant date he held 61 such notes of the aggregate value of Rs. 61,000 and that he had been wrongly assessed on the whole amount of Rs. 61,000 as undisclosed profits. The Appellate Assistant Commissioner confirmed the order of the Income-tax Office, but the Tribunal on appeal partly accepted the appellant's contention as to Rs. 31,000 and rejected the contention as to Rs. 30,000. The High Court held that the sum of Rs. 30,000 represented profits and that the finding was one of fact and that it was not an arbitrary one. The High Court, therefore, confirmed the order. The High Court also observed that it was impossible to say that the inference drawn by the Tribunal from the circumstances was an unreasonable inference that could never be drawn. The Supreme Court, while applying the true principles as on interference with the findings of facts by the Tribunal, observed as follows :

87. The Tribunal also fell in to the same error. It could not negative the possibility of the appellant being in possession of a substantial number of these high denomination currency notes. It, however, considered that it was impossible for the appellants to have had 61 such notes in the cash balance in their hands on 12th January, 1946, and then it applied a rule of the thumb treating 31 out of such 61 notes as within the bounds of possibility, excluding 30 such notes as not covered by the explanation of the appellants. This was pare surmise and had no basis in the House of Lords in Cameron v. Prendergast :

'Inferences from facts stated by the Commissioners are matters of law and can be questioned on appeal. The same remark is true as to the construction of documents. If the Commissioners state the evidence and hold upon that evidence that certain results follow, it is open to the court to differ from such a holding.'

88. To the same effect are the observations of the House of Lords in Bomford v. Osborne.

'No doubt there are many cases in which Commissioners, having had proved or admitted before them a series of facts may deduce therefrom further conclusions which are themselves conclusions of pure fact. But in such cases the determination in point of law is that the facts proved or admitted provide evidence to support the Commissioners' conclusions.'

89. The latest pronouncement of the House of Lords on the question is to be found in Edward v.

Bairstow Viscount Simonds observed at page 586 :

'For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarised by saying that the court should take that course if it appears that the Commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained.' and Lord Radcliffe expressed himself as under at page 592 :

'If the case contains anything ex facie which is bad law and which bears upon the determination, it is obviously erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene.'

90. It follows, therefore, that facts proved or admitted may provide evidence to support further conclusions to be deduced from them, which conclusions may themselves be conclusions of fact and such inferences from facts proved or admitted could be matters of law. The court would be entitled to intervene if it appears that the fact finding authority has acted without any evidence or upon a view of the facts, which could not reasonably be entertained or the facts found are such that no person acting judicially and property instructed as to the relevant law would have come to the determination in question."

91. Venkatarama Ayyar J. preferred to rest his concurring decision on the ground that the finding of the Tribunal that high denomination note of the value of Rs. 30,000 represented concealed profits of the appellant was not supported by any evidence and was, in consequence, erroneous in point of law and, therefore, liable to be set aside.

92. Mr. Hajarnavis for the revenue drew our attention to a judgment of the Kerala High Court, Commissioner of Income-tax v. P. R. Krishna Iyer, where it was held that in the case of seizure of gold on the person of the assessee the onus was on the assessee to prove the nature and the source of the same. The court observed as follows :

"The onus of proof of the source and nature of a receipt is on the assessee. In the absence of an explanation or in the face of an explanation which is found to be unsatisfactory, the inference that the receipt is income in the hands of the assessee can be drawn by the revenue Section 68 and 69 of the Act of 1961 set out the law on the subject."

93. It was also held on the facts that the burden of proving the source of the amount expended for obtaining the gold had not been discharged by the assessee and the department was justified in treating the value of the gold as income from undisclosed sources.

94. First of all it is to be noticed that in this case the assessee was found with 260 tolas of gold on his person of the value of Rs. 18,000, which cannot be said to be a very large quantity. The assessee's contention was that the gold did not belong to him but to one Mohamed Koya of Kozhikode. The assessee stated that he had borrowed Rs. 3,500 from one Subramania Ayyar for payment to Koya as advance.

95. Now, this authority can be of no assistance to Mr. Hajarnavis for the very simple reason that it begs the question. In other words, it completely ignores the conditions precedent as to the application of the provisions of section 68 or 69 or 69A, which has to be fulfilled before the question of any explanation on the part of the assessee as to the source can even arise. On the facts also the case does not deal with the matter in issue here, viz, whether the department was justified in drawing an inference of ownership from the fact of possession and whether there was no evidence on which the department could come to a finding of investment and/or ownership. There is a reference to the Supreme Court judgment in A. Govindarajulu Mudaliar v. Commissioner of Income-tax, but that case is also not applicable to the facts of the present case because there was no dispute in that case as to the existence of amounts in question and the point that was raised was that it was the duty of the department to adduce the evidence to show from what source the income was derived, in other words, the factum of the amount of cash received was not in dispute.

96. There is no doubt that the onus of proving the source of the sum of money found to have been received by the assessee is on him, but the question first is whether the factum of the receipt of that money has been established. In the Kerala case, there was at least one admission that Rs. 3,500 was borrowed for payment to Mohamed Koya so that a nexus had been established.

97. It is appropriate now to refer to a decision of the House of Lords in Bean v. Doncaster Amalgamated Collieries Ltd. wherein it was held that if an inference is made from facts which do not logically support such an inference then in is a question of there being no evidence. The following observations occur at page 307 :

"Unless the Commissioners, having found the relevant facts and put to themselves the proper question, have proceeded to give the right answer, they may be said, on this view, to have erred in point of law. If an inference from facts does not logically accord with and follow from them, then one must say that there is no evidence to support, is to make an error in law."

98. Against the background of these facts and circumstances and on the authorities referred to, I find it difficult to resist the contention of Mr. Albal that in the instant case the conclusion of the taxing authorities that the petitioner must have somehow paid for the gold, that he was beneficially interested in the gold and that he was the owner of the gold is based on no evidence

and, therefore, the assessment in so far as the value of the gold is concerned is liable to be set aside as being without the authority of law.

99. The next point which was canvassed by Mr. Albal, the learned advocate for the petitioner, was that the Tribunal had erred in law in not allowing the petitioner to rise the plea that the price of the said gold which was confiscated on 18th September, 1961, by the customs authorities was a business or trading loss and that by not so allowing him to raise this plea the Tribunal refused to exercise jurisdiction which in law it was bound to do. Mr. Albal contended that the taxing authorities having accepted the finding of the criminal court that the petitioner was dealing in gold and having relied on it ought to have treated the loss of the gold by confiscation as a trading loss and allowed set-off under the relevant provisions of the Income-tax Act.

100. Now, it is to be noticed that this point was raised before the Tribunal for the first time. But if it is considered to be a pure question of law, or a plea which could be considered on the evidence already on record, then the Tribunal would be under a statutory obligation to entertain the plea and decide the same no matter at what stage it was taken. The law on this aspect of the case may be briefly stated. Under the provisions of the Indian Income-tax Act the Tribunal has the necessary jurisdiction to allow any new question to be raised for the first time in an appeal before it and it is well-settled that the Tribunal should allow such question to be raised if it is a question which can be decided on the facts already on record. The Tribunal has the power and the jurisdiction to grant relief under the provisions of the Act on even a ground different from that which was urged before the lower authorities. It may allow a new point to be taken after the evidence or without taking fresh evidence and it has been held that in an appropriate case it would be the duty of the Tribunal in order to do complete justice to the assessee to remand the matter back to the Income-tax Officer to gather necessary material so that the benefit of any provision may be given to the assessee. It is not as if there was a contest between the taxing authorities and the assessee. The taxing authorities duty bound to comply with the provisions of the law and where there is a provision under which relief can be given to the assessee and the necessary material is available it would be the duty of the taxing authorities to do so. No doubt the Tribunal would have a discretion if the necessary material not already on record. But once it is shown that the necessary material is on record, the Tribunal would be required to consider the plea.

101. The learned Tribunal, however, in the matter before us declined to entertain and consider the plea of set-off and observed as follows :

"In reply the assessee's learned counsel submitted that the Appellate Tribunal would be perfectly justified in considering the question, that it would not be said to be a new ground, that no fresh facts required to be investigated and that even otherwise the Appellate Tribunal had jurisdiction

to entertain the ground. Reliance was placed on the decision of the Supreme Court inCommissioner of Income-tax v. Mahalakshmi Textile Mills Ltd. and Beharilal Ramacharan Cotton Mills v. Commissioner of Income-tax, Again :

"We consider that the objection of the department is well-founded. The assessee is trying to set up an entirely new case not even hinted at in any of the proceeding before. Fresh facts would certainly require to be gathered and investigated. We do not find any sanction for such a procedure in any of the decisions cited by the assessee's learned counsel. It was not a case of calling in aid one more provision of law to; support the claim as happened in the case as happened in the case of Beharilal Ramcharan Cotton Mills Ltd. or in the case of Mahalakshmi Textile Mills Ltd. We refuse permission to raise this new issue as it could not be decided without taking further evidence."

102. Now, first of all, I find it difficult to understand how the Tribunal could say that the plea of set-off would require fresh facts without applying its mind as to what were those fresh facts or at least ingredients which would have to be brought on record in order to support the plea. Unfortunately, the Tribunal does not even hint as to what are the fresh facts which would be required to consider the petitioner's plea of set-off. It is possible that if the plea had been considered and decided, the Tribunal may have, on consideration of the relevant facts and the law applying thereto, held that the set-off could not be granted. But nothing of that kind was done.

103. In requires to be observed that it is not in dispute that the gold had in fact been confiscated by the customs authorities in 1961 and was lost to the petitioner, assuming, of course, that the petitioner had made the necessary investment in gold and/or was the owner thereof. And it may be stated that is the point which is said to have been found by the Income-tax Officer and on that basis the value of the gold had been included in the assessment. Both the Income-tax Officer and the Appellate Assistant Commissioner have referred to the petitioner as being a person who was dealing in gold. It is also a fact, which is not without significance, that the quantity of gold involved was approximately 50,000 tolas.

104. It is not easy to understand how the Tribunal could properly say that "it was not a case of calling in aid one more provision of law". The petitioner was doing precisely that. He was asking the Tribunal to take into consideration the provisions of law relating to set-off and consider that very question, i.e., whether these provisions could be called in aid for the benefit of the petitioner. It is, as I have said, quite possible that on a proper hearing and ascertainment of the relevant material the Tribunal may have come to a finding that, on the facts and circumstances of the case, a set-off could not be allowed, but that stage never arrived.

105. It is appropriate now to refer to the judgments of the Supreme Court in commissioner

ofIncome-tax v. Mahalakshmi Textiles Mills Ltd. which was cited before the Tribunal, but on which there is no discussion by the Tribunal excepting the statement that reliance was placed on this decision. The Supreme Court made the following observation :

"By the first question the jurisdiction of the Tribunal to allow a plea inconsistent with the plea raised before the department authorities is canvassed. Under sub-section (4) of section 33 of the Indian Income-tax Act, 1922, the Appellate Tribunal is competent to pass such orders on the appeal 'as it thinks fit'. There is nothing in the Income-tax Act which restrict the Tribunal to the determination of questions raised before the department authorities. All questions whether of law or of fact which relate to the assessment of the assessee may be raised before the Tribunal; if for reasons recorded by the departmental authorities in rejecting a contention raised by the assessee, grant of relief to him on another ground is justified, it would be open to the departmental authorities and the Tribunal, and indeed they would be under a duty, to grant that relief. The right of the assessee to relief is not restricted to the plea raised by him." Again, in Beharilal Ramcharan Cotton Mills Ltd. v. Commissioner of Income-tax, the court observed as follows :

"There is nothing in the Income-tax Act or the Income-tax Rules or in the rules prescribed by the Tribunal itself for regulation its procedure which prevents a party from taking a ground in the memorandum of appeal before the Tribunal which it had not urged before either the Income-tax Officer or the Appellate Assistant Commissioner."

106. As I have stated above, in my view, it was the duty of the Tribunal to entertain and consider the plea of set-off and after applying its mind decide whether the petitioner was entitled to the relief under sections 70 and 71 of the Income-tax Act or not.

107. Now, sections 70 and 71 of the Income-tax Act, 1961, read as follows :

"70. Set off of loss from one source against income from another source under the same head of income. - (1) Save as otherwise provided in this Act, where the net result for any assessment year in respect of any source falling under any head of income other than 'Capital gains' is a loss, the assessee shall be entitled to have the amount of such loss set off against his income from any other source under the same head.

(2) (i) Where the result of the computation made for any assessment year under sections 48 to 55 in respect of any short-term capital asset is a loss, the assessee shall be entitled to have the amount of such loss set of against the income, if any, as arrived at under a similar computation made for the assessment year in respect of any other capital asset.

"71. Set off of loss from one head against income from another. - (1) where in respect of any assessment year the net result of the computation under any head of income other than 'Capital

gain' is a loss and the assessee has no income under the head 'Capital gain', he shall, subject to the provisions of this Chapter, be entitled to have the amount of such loss set off against his income, if any, assessable for that assessment year under any other head.

(2) Where in respect of any assessment year the net result of the computation under any head of income other then 'Capital gain' is a loss and the assessee has income assessable under the head 'Capital gain' such loss may, subject to the provisions of this Chapter, be set off -

(i) against the income, if any, of the assessee assessable for that assessment year under any head including income assessable under the head 'Capital gain' (whether relating to short-term capital assets or any other capital assets), or

(ii) if the assessee so desires, only against his income, if any, under the head 'Capital gain', in so far as such income relates to short-term capital assets, and income under any other head.

(3) Where in respect of any assessment year the net result of the computation under sections 48 to 55 in respect of capital gains relating to short-term capital assets is a loss and the assessee has income assessable under any head of income other than 'Capital gain', the assessee shall, subject to the provisions of this Chapter, be entitled to have such loss set off against the income aforesaid."

108. It was suggested that even though the Tribunal had not indicated as to what would be the fresh facts which would be required to be brought on record, there were certain obstacles in the way of the petitioner. One of them was that the petitioner had asked for reduction in the value of gold on the footing that the gold was not intended for sale.

109. Mr. Hajarnavis, the learned counsel for the revenue, states that his (petitioner's) request for reduction in the value of gold on the basis that the gold was not intended for sale was inconsistent with his plea for claiming set-off.

110. Now, this is only one of the factors which the Tribunal would have had to consider and in my view there is nothing to prevent the Tribunal from allowing a plea which may be inconsistent with the previous ascertainment. The assessment has to be made under the provisions of the Income-tax Act. and if the plea of an assessee is inconsistent with the provisions of the Act the provisions of the Act. must prevail. Whether the plea is to the benefit of the assessee or against his interests would be immaterial.

111. Another obstacle that was suggested to be in the way of the petitioner's claim was that fresh facts would have in any event to be gathered became there were no means of ascertaining as to whether the value of the gold as income from undisclosed source was earned by the petitioner

under the head of speculative business or capital gains. Now, it requires to be stated that there are, in any event, two limitation to the rule of set-off. A loss in a speculative business can be set off only against profits under another speculative business and a loss in respect of capital assets can be set of against income from any other capital assets.

112. Now, in so far as the first limitation is concerned, no further investigation of facts would have been necessary because speculative transaction has been defined in section 43(5), which reads as follows :

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

Provided that for the purpose of this clause -

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

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

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

shall not be deemed to be a speculative transaction."

113. It is also obvious that from the material on record it could never be contended that if the petitioner was dealing in gold, then such a transaction was a speculative transaction. As regards the question of what constitutes a capital asset, there could also be no controversy that, if the petitioner was in fact dealing in gold, then the contraband gold which he had brought into the country was a circulating capital or stock-in-trade and not a capital asset.

114. It has been held by the Supreme Court that there is ample jurisdiction in the Tribunal to allow any new question to be raised for the first time in appeal before it and if necessary to remand the matter for investigation calling for fresh facts. In the instant case no fresh facts appear to be required for the purpose of considering the plea which was raised by the petitioner that he should be granted relief by way of set-off. The Tribunal was, therefore, in my view, in

error in holding that it could not do so without investigating fresh facts which it did not even care to outline.

115. Mr. Hajarnavis for the revenue, however, contented that the loss suffered by the assessee consequent on the confiscation of gold cannot be said to be a commercial loss and the assessee could not have claimed any set-off even if the petitioner had succeeded in laying down a foundation for claiming set-off. In other words, Mr. Hajarnavis's contention is that confiscation of gold being in the nature of the penalty, it could not be treated as a commercial loss and, therefore, no relief could be granted to the assessee by way of set-off or otherwise. A question, therefore, arises as to whether confiscation of gold by customs authorities can never be equated with a commercial loss normally available for deduction or set-off under the provisions of the Income-tax Act. In other words, does the loss of gold by confiscation amount to a commercial loss.

116. It is not possible to accept Mr. Hajarnavis's contention that loss by confiscation is the same as a loss occasioned by reason of payment of penalty. It is true that in common parlance or for consideration in general law, confiscation of a person's property may operate as a punishment or the person concerned may feel that he has been penalised. It has been said that a person will rather forgive the death of his property. So great is the pain of deprivation of property.

117. But, in my view, for the purpose of the point under consideration there is a very significant difference between the payment of a fine or penalty and confiscation of contraband goods. Confiscation is loss of goods and there is no material difference between losing goods by theft, pilferage, fire, sinking at sea or deprivation by sovereign authority. Penalty, on the other hand, is expenditure or disbursement of something which goes out of the assessee's pocket or is forced out of him by coercive process of law. When viewed from the point of view of the Income-tax Act. (which taxes profits and gains even from illegal business) equating loss of goods by confiscation with imposition of a penalty can never be realistic. If reference is made on the provisions of the Sea Customs Act, it will be noticed that even under that Act. Confiscation is not equated with penalty but treated as something apart. It is well-settled that income arising out of illegality or wrong doing cannot escape taxation. Illegality in the making of profits is immaterial from the point of view and the purpose of the taxation law. As pointed out by Lord Haldane in Minister of Finance v. Smith, Income-tax Acts are not necessarily restricted to lawful business only.

118. The assessee may be committing an offence, he may be contravening the law, he may be punished and sent to jail, but if he makes a profit out of such illegal activities, such profits nevertheless are liable to be taxed.

119. The question that has arisen therefore, is that when one is considering profits from an illegal

business can that profit be considered as gross profit or net profit. In other words, would it be open to the assessee who is indulging in illegal business to say, "If you are taxing me on my profits from my illegal business then what is the reasoning and logic for not deducting or setting off losses which I have incurred in the same business ?"

120. At Bhagwati, Actg. C.J. (as he then was), observed in Commissioner of Income-tax v. S. C. Kothari :

"... illegal business is business within the meaning of the Income-tax Act and if profits from illegal business are assessable to tax, there is no reason either on principle or on authority for refusing to take into account losses from illegal business."

121. Now, applying these tests, it is realistic to hold that when a person is engaged in the illegal business of smuggling and dealing in contraband articles, whether it be gold, whether it be money, bullion, jewellery, or any other article, it would not be unreasonable to take the view that the loss of stock-in-trade so acquired - in this case in the shape of gold biscuits - by confiscation by the customs authorities would be trading loss in the very same commercial sense as it would have been if the business had been a legal business. It cannot, with any show of reason, be said that such a deprivation of gold or stock-in-trade or other articles would not be a loss incurred in the carrying on of the illegal business in such gold or other articles. It does not require much argument to notice that the loss of gold by confiscation is an inherent hazard in the whole process of bringing in and smuggling gold and dealing with it and such a hazard could well be described in the circumstances of the case as a business hazard.

122. I am supported in my view by a judgment of the High Court of Punjab and Haryana in Commissioner of Income-tax v. Piara Singh, where the learned judges observed that the hazard of losing the money with which the gold had to be acquired was inherent in the activity of smuggling of gold and the confiscation of the amount was a loss allowable under section 10(1) of the Indian Income-tax Act, 1922.

123. In that case the assessee, Piara Singh, was carrying on regular smuggling activity which consisted of taking out of India Indian currency notes and exchanging them with gold in Pakistan and then smuggling that gold into India. He was caught by the customs authorities and gold amounting to Rs. 65,500 found on him was confiscated from him. He claimed the amount as a trading loss. The Income-tax Tribunal accepted the claim of the assessee that confiscation of the amount from him was a trading loss and the order of the Tribunal was confirmed by the High Court.

124. In the same judgment there is a reference to a judgment of the Bombay High Court (and of

the Supreme Court thereafter) in the case of Commissioner of Income-tax v. Haji Aziz and Abdul Shakoor Bros. The said judgment was distinguished by the learned judges of the Punjab and Haryana High Court on the ground that the deduction claimed therein was under section 10(2)(xv) of the Indian Income-tax Act, 1922, while Piara Singh was claiming deduction under section 10(1) on the footing that the true profits from his illegal business of smuggling gold could not be arrived at without taking into account the loss incurred by confiscation of Rs 65,500 by the customs authorities. The learned judges of the Punjab and Haryana High Court also observed that in the Bombay case the claim related to the amount expended by the assessee to get the goods which had already been confiscated released and that was not so in the case in hand.

125. Now, in the view that I have taken, in pith and substance, the loss of contraband gold by confiscation in the course of illegal business of smuggling and dealing in gold found to have been carried on by the petitioner and that such loss could be a commercial loss, then the judgment of the Bombay High Court and of the Supreme Court in the case of Haji Aziz and Abdul Shakoor Bros., would have no application for the question which is being decided here. It is appropriate to repeat that what is claimed by the petitioner before us is not that a disbursement by him by way of fine or payment of penalty should be allowed to him as a deduction but that in the course of the illegal dealing in gold by the petitioner (on which there is finding by the taxing authorities, the loss of gold sustained by the petitioner by reason of the said confiscation under on head of income should be allowed to be set off against another head of income, if otherwise permissible under the relevant provisions of the Income-tax Act.

126. Again, the case of Haji Aziz and Abdul Shakoor Bros. can have no application, because what fell for consideration in that case was not the loss of goods at all. What was considered there was that the assessee's goods, viz., the dates which he had imported in contravention of the law had been confiscated with an option to release the goods by payment of fine and that the assessee had incurred expenditure by paying the fine and obtaining release of the goods. The deduction claimed in that case, therefore, was clearly on the footing of the disbursement of money laid out and expended. There is no doubt, therefore, that in the case when the assessee incurred the liability he did so as a penalty for infringement of the law and that it was rightly held that the amount which was expended for obtaining the release of the goods was not deductible.

127. No such case arises in the instant case. No expenditure has been laid out for paying a fine or a penalty. Again it is to be noticed that what the Supreme Court laid down in that case was that "an expenditure is not deductible unless it is a commercial loss in trade and a penalty imposed for breach of the law during the course of the trade cannot be described as such."

128. It is significant that in the case before us there is a loss of stock-in-trade itself and the claim for set-off does not in any manner relate to the payment of a fine or a penalty.

129. In Commissioner of Income-tax v. S. C. Kothari, the Supreme Court had occasion to consider deduction of a loss relating to a transaction which was held to be illegal by reason of the prohibition contained in the Forward Contracts (regulation) Act, 1952, and it was held on the facts of that case that no set-off could be allowed under the first proviso to section 24(1) read with Explanation 2 of the Act of 1922.

130. That was a case where a deduction had been claimed in respect of a transaction which was not only illegal but unenforceable. The assessee had entered into certain contracts for supply of ground-nut oil. In the events that happened, contrary to the alleged expectation of the assessee when these contracts could not be performed, differences had to be paid. Thus, the assessee had laid out and paid an amount in relation to speculative transaction which the other party could not have enforced by reason of the transaction being hit by the provisions contained in the Forward Contracts (Regulation) Act, 1952. It was only in these circumstances that it was held that deduction of loss could be made under section 10(1) but no set-off could be allowed under section 24(1), first proviso. It is appropriate to set out in extenso some of the observations of the Supreme Court in order to appreciate that this case can have no application to the facts before us.

131. The Supreme court observed :

Coming to the second question..... It appears that there were two aspects which had come up for consideration before the departmental authorities, the Tribunal and the High Court. The first aspect related to the deduction of the loss of Rs. 3,40,443, incurred in the aforesaid illegal transactions while computing the profits of the assessee's speculative business under section 10(1). The other was the set-off which can be allowed within the relevant parts of section 24 of the Act of 1922. The High Court referred to various English decisions as also to Wheatcroft's Law of Income Tax and Simon's Income Tax for supporting the view that even where a trade is illegal it would still be a trade within the meaning of the income-tax law and if any profits are derived from such trade they would be assessable to tax. The High court did not accept the contention urged on behalf of the revenue that although the profits from an illegal trade or business would be exigible to tax the losses from such business could not be taken into account while computing the profits. This is what the High Court observed :

'There is in principle no distinction between profits and losses of a business and if the profits of an illegal business are assessable to tax, equally the losses arising from illegal business must be held to be liable to be taken into account in computing the income of the assessee.'

132. The High Court was not inclined to accede to the submission on behalf of the revenue that the same principle would be applicable as has been applied in certain cases in which the question which came up for determination was whether an expenditure incurred on an illegal activity

would be deductible under section 10(2)(xv) of the Act of 1922. One of such cases is a decision of the Punjab High Court in Raj Woollen Industries v. Commissioner of Income-tax. In that case the] real question was whether a certain amount which was paid to achieve what was prohibited by law, viz., the export of wool without having the requisite export licence, was an amount which the assessee was entitled to deduct under section 10(2)(xv) of the Act of 1922. It was held that according to principle and authority such a deduction could not be claimed. It was also observed that such a deduction could not be permissible even under section 10(1). The following observations may be referred to :

'Profits had to be ascertained according to the accepted principles of commercial accountancy and if section 10(2)(xv) did not permit deduction of an item of expenditure which was laid out or expended for carrying of the business in contravention of the law, then such an outgoing though otherwise properly admissible, as set-off against the gross receipts on the principles of commercial accountancy could not be taken into consideration in computing the profits.'

133. On the other hand according to the decision of a Full Bench of the Allahabad High Court in Chandrika Prasad Swarup v. Commissioner of Income-tax, income assessable to tax is the actual income of an individual or a firm irrespective of the manner in which the income was derived. Legality or illegality of the transaction culminating in profits or losses was, therefore, foreign to the scope of an inquiry into the income of an individual or a firm for the purpose of income-tax."

134. Again, at page 801, it was observed as follows :

"The approach of the High Court, in the present case, has been that in order to arrive at the figure of profits even of an illegal business the loss must be deducted if it has actually been incurred in the carrying on of that business. It is the net profit after deducting the outgoings that can be brought to tax. It certainly seems to have been held and that view has not been shown to be incorrect that so far as the admissible deductions under section 10(2) are concerned they cannot be claimed by the assessee if such expenses have been incurred in either payment of a penalty for infraction of law or the execution of some illegal activity. This, however, is based on the principle that an expenditure is not deductible unless it is a commercial loss in trade and a penalty imposed for breach of the law during the course of the trade cannot be described as such. Penalties which are incurred for infraction of the law are not a normal incident of business and they fall on the assessee in some character other than that of a trader : (See Haji Aziz and Abdul Shakoor Bros. v. Commissioner of Income-tax). In that case this court said quite clearly that a disbursement is deductible only if it falls within section 10(2)(xv) of the Act of 1922, and a penalty cannot be regarded as an expenditure wholly and exclusively laid out for the purpose of the business. Moreover, disbursement or expenses of a trader is something, which comes out of his pocket. A loss is something different. That is not a thing which he expends or disburses. That

is a thing which comes upon him as extra'. Finally J. in Allen v. Farquharson Brothers & Co. If the business is illegal neither the profits earned nor the losses incurred would be enforceable in law. But that does not take the profits out of the taxing statute. Similarly, the taint of illegality of the business cannot detract from the losses being taken into account for computation of the amount which can be subjected to tax as 'profits' under section 10(1) of the Act of 1922. The tax collector cannot be heard to say that he will bring the gross receipts to tax. He can only tax profits of a trade or business. That cannot be done without deducting the losses and the legitimate expenses of the business. We concur in the view of the High Court that for the purpose of section 10(1) the losses which have actually been incurred in carrying on a particular illegal business must be deducted before the true figure relating the profits which have to be brought to tax can be computed or determined."

135. It is to be noticed that the Supreme Court has made a clear distinction between confiscation of goods and disbursement which comes out of the pocket of the assessee and that a loss is something different from the payment of a penalty. It is also significant that the observation has been made that even when profits from an illegal business were to be taxed "the tax collector cannot be heard to say that he will bring the gross receipts to tax."

136. In the view that I have taken that the assessment made by the taxing authorities in so far as the value of gold was concerned is based on no evidence and, therefore, liable to be set aside, it is unnecessary for me to decide in this writ petition whether the set-off, as claimed by the petitioner, would have in fact been allowed or not. Mr. Albal's contention that the trading loss so incurred by the assessee would fall under the head "D" and that it would, therefore, be permissible to allow a set-off against the value of gold treated by the taxing authorities as income under head "F" appears to me to be at least prima facie tenable.

137. In any event it is sufficient for the purpose of this petition to hold that the Tribunal was in error in not entertaining and considering the plea of the petitioner for a set-off and, therefore, for that reason also the assessment in so far as the value of the gold is concerned, is liable to be set aside. Now, so far as this aspect of the matter is concerned the case would require to be remanded back to the Tribunal with a direction to consider and decide the plea of set-off according to law and on the facts already obtaining on the record.

138. This brings me to a consideration of the maintainability of this petition and whether this court can and should entertain the petition and grant relief to the petitioner.

139. While it is true that the Income-tax Act is a self-contained code exhaustive of the matter dealt with therein, nothing in the Act can override the powers of the High Court under article 226 of the Constitution to issue writ of deduction in an appropriate case, particularly to ensure that the

ends of justice are served. Thus the High Court can quash proceedings even of the income-tax authorities which may be held to be without jurisdiction or without the authority of law. The High Court may quash an order vitiated by an error apparent on the face of the record or passed in violation of the principles of natural justice.

140. These propositions are too well-known to require any elaborate discussion of the authorities.

141. The existence of an alternative remedy under the Income-tax Act would not bar such exercise of powers, particularly if the alternate remedy is onerous, likely to be time-consuming or even likely to cause harassment to the citizen in his effort to obtain vindication of his legal rights.

142. If, therefore, the action of the taxing authorities is such that it violates any fundamental rights of the assessee or is not in compliance with the statutory provisions or it is without the authority of law then the High Court would not only have the jurisdiction to issue writs, directions and orders, as may be necessary, to ensure that justice is done but it would even be under a duty to do so.

143. If it is necessary to cite an authority, then reference may be made to the case of Calcutta Discount Co. Ltd. v. Income-tax Officer, Companies District I, Calcutta, to which our attention was invited by Mr. Albal, the learned advocate for the petitioner. At page 207, the Supreme Court observed as follows :

"Mr. Sastri mentioned more than once the fact that the company would have sufficient opportunity to raise this question, viz., whether the Income-tax Officer had reason to believe that under-assessment had resulted from non-disclosure of material facts, before the Income-tax Officer himself in the assessment proceedings and, if unsuccessful there, before the appellate officer or the Appellate Tribunal or in the High Court under section 66(2) of the Indian Income-tax Act. The existence of such alternative remedy is not however always a sufficient reason for refusing a party quick relief by a writ or order prohibiting an authority acting without jurisdiction from continuing such action."

144. The Supreme Court in the same case held that the High Court can under article 226 of the constitution investigate conditions for the exercise of jurisdiction by the Income-tax Officer. That was a case in which the Income-tax Officer had issued a notice under section 34 of the Act of 1922 and it was held that the condition precedent to the exercise of that power was wanting and, therefore, the Income-tax Officer had no jurisdiction.

145. It is to be noticed that I have already held that in the case before us the condition precedent in the relevant sections deeming the value of investment or the value of bullion to be the income of the assessee was not made out on any evidence before the taxing authorities.

146. It is also to be noticed that this is a case of great hardship. Offences relating to the smuggling of gold were committed in 1961, the petitioner has been punished for his contravention of the law and has, I am told, served out the sentence of two years' rigorous imprisonment. The petitioner has stated that the alternate remedy which was open to him, that is to say, an application under section 256(2) of the Income-tax Act, 1961, was onerous in so far as he was required to pay a court-fee of Rs. 7,500. Now, it has been suggested by Mr. Hajarnavis for the revenue that there was nothing to prevent the petitioner from filing such an application in forma pauperis and a judgment of this High Court in Pauper Petition No. 3 of 1972 decided by Nain J. on the 8th of December, 1972, has been shown to us. The contention is no doubt attractive, but it does not take into account several other factors. One of them being, as we are told at the Bar by Mr. Albal, the learned advocate for the petitioner, that the entire property of the assessee has been attached and that the time-consuming procedure under the Income-tax Act would have placed an intolerable burden on the petitioner. In the words of the Supreme Court, when there is nothing in the conduct of the petitioner which would justify the refusal of a proper remedy under article 226 of the Constitution such relief should be given. In fact, the Supreme Court has in the Calcutta Discount Company's case, referred to above, in terms observed that :

"When the Constitution confers on the High Courts the power to give relief, it becomes the duty of the courts to grant such relief in fit cases and the courts would be failing to perform their duty if relief is refused without adequate reasons."

147. In the present case, I an unable to persuade myself that relief should be denied to the petitioner, who has already paid his debt to the society and whose property, as stated by Mr. Albal, has been attached.

148. In a recent case of Champala Binani v. Commissioner of Income-tax the Supreme Court reaffirmed that a writ of certiorari may lie to the High Court where the order is on the face of it erroneous or raises the question of jurisdiction or infringement of fundamental rights off the petitioner. The Supreme Court also observed that if the petitioner does not avail of the alternate remedy provided under the Income-tax Act for obtaining relief against the improper action of the authority then the High Court will require a strong case to be made out for entertaining a petition under article 226. It was held on the facts of that care that no adequate ground had been made out for entertaining the petition and this finding was based on the conduct of the petitioner in that case. In the present case, as I have already stated, the conduct of the petitioner is not such as would disentitle him to relief under article 226 of the Constitution.

149. Notice may be taken of another judgment of the Supreme Court in Joharmal Murlidhar and Co. v. Agricultural Income-tax Officer, Assam. In that case it was held that the High Court was entitled to refuse to interfere on the ground that statutory remedy was not availed of. The

Supreme Court, however, noticing the amount involved and the nature of the proof being very simple, gave partial relief by directing fresh issuance of notice for assessment after having held that prima facie the impugned order appeared to be an arbitrary one.

150. The result, therefore, is that the petition is allowed, the rule made absolute and the orders of the Income-tax Officer, the Appellate Assistant Commissioner and the Income-tax Tribunal are quashed and set aside.

(On difference of opinion) Tulzapurkar, J.

151. This matter has been referred to me for decision as a third judge on a difference of opinion having been arisen between Mr. Justice Deshpaude and Mr. Justice Mukhi on two points which difference has affected the final disposal of the petition.

152. A few facts giving rise to this application under articles 226 and 227 of the Constitution may be stated : The petitioner (assessee) has been carrying on business of transporting iced fish, mangoes and other goods by sea from Konkan ports to Bombay in his own launches as also launched belonging to a partnership firm managed by him. At the material time he was the owner of a launch, "Lakshmi". On April 24, 1961, the Central Excise authorities seized 4,999 biscuits of gold so seized by an order dated 18th September, 1961. The petitioner and some others were also tried before the Special Judicial and Additional Chief Presidency Magistrate, Bombay, for offences of criminal conspiracy under section 120-B, Indian Penal Code, read with section 167(81) of the Sea Customs Act, 1878, and section 23 of the Foreign Exchange Regulation Act, 1947. The learned Magistrate at the end of the trial convicted the petitioner and some other accused for those offences on July 22, 1963, and the petitioner was sentenced to suffer rigorous imprisonment for two years. The said conviction and sentence imposed upon him by the learned Magistrate were confirmed by the High Court on August 11, 1964, and the appeal of the petitioner and others to the Supreme Court was also dismissed by that court on November 6, 1968.

153. In the meanwhile the petitioner (assessee) submitted his return of his income for the assessment year 1962-63 corresponding to the year S. Y. 2017, i.e., September 1, 1962. In his return he disclosed his income from property, share of profit from the firm of M/s. Parkar Navigation and company, M/s. Deogad Fisheries and M/s. Parkar Brothers. He also disclosed his salary income which he received from M/s. Parkar Navigation and Company and dividend income of his share. In response to a notice issued by the Income-tax Officer, B-Ward, Kolhapur, who had the jurisdiction the assess the petitioner-assessee under the provisions of the Income-tax Act, 1922, and the Income-tax Act, 1961, the petitioner-assessee appeared before the said officer along with his advocate and produced before him the case books and the ledger book and other

documents. It appears that the Income-tax Officer had come to know of the seizure of gold to the tune of 49,990 tolas from the petitioner-assessee's launch on April 24, 1961, and the conviction of the assessee along with other by the Special Judicial and Additional Chief Presidency Magistrate and, therefore, in the course of assessment proceedings the petitioner assessee was called upon to explain the possession of such gold and the source of money that was required for investment in such huge quantity of gold. Initially, the petitioner-assessee by an oral statement made to the Income-tax Officer denied that he had indulged in any sort of smuggling activities in gold and contended that he had been falsely implicated in the case on the basis of statements and evidence given by approvers and that his convictions were wrong and these were the subject-matter of an appeal. Subsequently, he submitted his statement in the form of a letter dated July 27, 1966, which he addressed to the Income-tax Officer. By this letter he reiterated his earlier stand that he had been falsely involved in the smuggling case, that the witnesses examined in the said trial were approvers and the customs officials, who had given false evidence against him and that against his convictions and sentence an appeal to the Supreme Court was pending in which he expected that he would be acquitted. He concluded his letter by saying :

"In view of the above submissions it is requested that as far as income-tax matters are concerned, in the absence of any proof that I did possess the gold attributed in the case, department cannot tax the amount in my case, as the onus to prove one way or the other is on the department." Along with this letter he enclose many other documents including the copy of the judgment of the Special Judicial Presidency Magistrate in Case No. 140/W of 1963 dated July 22, 1963, and the copy of his written statement filed before the said Magistrate. In other words, he denied the possession of gold in question and contended that without any proof being led in that behalf the department could not tax the value of that gold as his income.

By assessment order dated February 13, 1967, the Income-tax Officer computed the total income of the petitioner-assessee under section 143(3) of the Income-tax Act to the tune of Rs. 70,98,834, Rs. 70,78,584 having been added to his income by way of "investment in acquisition of gold as income from undisclosed sources as discussed above". The value of the gold in question was ascertained at this figure by adopting the prevailing rate of gold at Rs. 141.60 per tola. He referred the question of penalty for concealment of income to the I. A. C. P. (R. II), Poona. On appeal by the assessee made to the Appellate Assistant Commissioner of Income-tax the findings recorded by the Income-tax Officer were substantially confirmed. However, in regard to the value of the gold, it was contended on behalf of the assessee that the Income-tax Officer was in error in adopting the prevailing market rate of gold in India, i.e., Rs. 141.60 per tola for bringing the investment in gold to tax and that at the most for this purpose the international rate of gold prevailing on April 24, 1961, the date of the seizure of the gold should have been adopted as the basis. Though this contention was not accepted in it entirety the

Appellate Assistant Commissioner reduced the value of gold involved in the investment from Rs. 70,78,584 to Rs. 47,19,056 and this was done on the basis namely :

"Taking into account the attendant great risk normally taken by the purchaser of the imported contraband gold in such illegal transactions, the possible outlay on the expenditure and disbursements to the persons involved, the margin of profit on the sale is bound to be substantial, I estimate at 331 1/3%. The amount of Rs. 701,78,584 is accordingly reduced to Rs. 47,19,056 which would be the estimated cost of investment in the contraband gold and is includible as income from undisclosed sources."

154. The Appellate Assistant Commissioner directed penal proceedings to be initiated separately for default under section 27(1)(c) of the Income-tax Act. As a result of this relief granted in the appeal the total income was reduced by Rs. 23,59,528. In the appeal which was carried to the Income-tax Appellate Tribunal apart from challenging the assessment orders passed by the income-tax Officer and the order passed by the Appellate Assistant Commissioner in appeal, on merits it was contended on behalf of the assessee as and by way of alternate plea that since the entire gold had been confiscated by an order passed by the Collector of Central Excise on September 18, 1961, the assessee was entitled to have this loss treated as trade loss and the same should be allowed as set-off against the income assessed. The Tribunal did not permit the assessee to raise this plea for the first time in appeal since, in its view, it necessitated investigation into fresh facts and that the point could not be decided without taking further evidence. The Tribunal dismissed the appeal on March 9, 1970. Thereafter, the assessee seems to have made an application for reference to the High Court under section 256(1) of the Income-tax Act, 1961, in regard to certain questions of law referred in paragraphs 21 of the Tribunal's order, but that application was rejected by the Tribunal on February 10, 1971. Instead of making an application to this court under section 256(2) of the Income-tax Act, the petitioner-assessee filed this writ petition under articles 226 and 227 of the Constitution in this court on June 15, 1971, praying for a writ in the nature of certiorari for quashing the assessment order dated February 13, 1967, passed by the Income-tax Officer and the order dated March 9, 1970, passed by the Income-tax Appellate Tribunal and also for a writ in the nature of prohibition permanently restraining the Income-tax Officer and the Tribunal, their servants and agents from acting in pursuance of the said assessment orders. In the alternative the petitioner prayed for remand of the matter to the Tribunal with a direction that the Tribunal should allow the petitioner to argue the point that the loss arising to him due to the confiscation of the gold was an allowable business loss.

155. Before the Division Bench, which heard this matter, a preliminary objection to the maintainability of the petition was raised by Mr. Hajarnavis appearing for the revenue on the

ground that under section 256(2) an alternative remedy for approaching the High Court requiring the Tribunal to state the case and making a reference in the event of the Tribunal declining to refer under sub-section (1) of section 256 of the Act was available to the petitioner and the same had not been availed of by him and that the petitioner had not made out any case for bypassing the said alternate remedy. However, the Division Bench did not uphold the preliminary objection and allowed the petitioner to argue his petition on merits. On behalf of the petitioner four or five contention were urged by Mr. Albal. In the first place, it was contended that the assessment order could not have been founded on the judgment and evidence produced before the criminal court. Secondly, Mr. Albal contended that even if the Income-tax Officer was found to be justified in relying upon such material, the entire materials did not establish the assessee's ownership over the gold in question and as such the value of such gold could under no circumstances be treated as income of the assessee from undisclosed source. In other words, the contention was that it was a case of an evidence at all and the finding about the ownership of gold in the petitioner was liable to be quashed. Thirdly, it was contended that the findings recorded by the income-tax authorities had been recorded in gross violation of natural justice, inasmuch as the witnesses examined before the criminal court, particularly the two approvers, Dhuri and Tarkar, had not been examined before the Income-tax Officer nor had the petitioner been permitted to examine himself in support of his case or to cross-examine the said two witnesses, It was fourthly contended that the income-tax authorities themselves were not clear whether the facts of the present case attracted the provisions of section 69 or 69A of the Income-tax Act, 1961, and that section 69A in any event could have no application to the assessment year 1962-63, when the section itself was inserted in the statute by the Finance Act of 1964, with effect from April 1, 1964, and section 69 could have no application whatsoever in the gold. Fifthly, it was contended that in either case when admittedly the smuggled gold had been confiscated by the excise and customs authorities, the assessee was entitled to claim loss suffered thereby as deductible loss while computing his net profits or was entitled to set off the same against the alleged undisclosed income. All these contentions were refuted by the revenue and the impugned orders were sought to be justified.

156. On a consideration of the rival submission that were put forward before the Division Bench, Mr. Justice Deshpande negatived all the contentions that were urged on behalf of the petitioner in the case. With regard to the first contention he took the view that the position was well-settled that the provisions of the Evidence Act did not apply to the proceedings before the Income-tax Officer and that it was open to the Income-tax Officer to rely upon the material in the form of judgment of the criminal court and come to a conclusion one way or the other on the question of ownership of gold. Relying upon direct authority of the Punjab High Court in the case of Anraj Narain Dass v. Commissioner of Income-tax, where reliance on the judgment of the criminal court by the Income-tax Officer was considered to be perfectly legal and further relying upon the

decision of the Supreme Court in Dhakeshwari Cotton Mills Ltd. v. Commissioner of Income-tax he took the view that no fault could be found with the income-tax authorities if they choose to rely upon the proceedings and the judgments of the criminal courts where an assessee was tried for the same set of facts and that the findings recorded in the criminal courts being undoubtedly relevant for deciding the controversies that had arisen in the case the Income-tax Officer was justified in coming to the conclusion on the issue involved before him basing his decision on such material. As regards the second contention that it was a case of no evidence at all on which a finding had been recorded that the gold in question had been purchased by the petitioner from his undisclosed income, he took the view that, though there was no direct evidence on the point, the material in the form of circumstantial evidence which was available on record was such that an inference of ownership of the gold in the petitioner could be reasonably and legitimately drawn. In this behalf he enlist as many as 10 facts which had been held to have been proved by the criminal court and after referring to the reasoning to the reasoning that had been adopted by the Tribunal which was based on the facts enlisted, he took the view that the circumstances relied upon by the income-tax authorities indicated the lead, initiative, drive and overall control of the assessee in the actual operation that was undertaken for acquiring the gold in question and that the assessee's further conduct in offering bribe to the tune of Rs. 5 lakhs and asking the inspector even to throw the gold, indicated the extent of his disposing power over the gold seized. He felt that it was impossible to hold that the view taken by the income-tax authorities was such as could not have been taken by a reasonable body of persons or that it was not supported by material on record or that it was arbitrary or capricious. In other words, Mr. Justice Deshpande held that the facts and circumstances appearing on record before the income-tax authorities were such that an inference about the ownership of the gold in the petitioner could be reasonably and legitimately drawn. He negatived the third contention urged on behalf of the petitioner that the findings had been recorded in violation of the principles of natural justice. He found that there was no material available on record from which it could be said that the petitioner had during the proceedings that were held before the Income-tax Officer either offered himself as a witness or had actually demanded the two witnesses, namely, Dhuri and Tarkar, for cross-examination and that a grievance in that behalf had been made before the Tribunal for the first time. In the circumstances he took the view that the contention that the Income-tax Officer had recorded his findings in violation of the principles of natural justice could not be sustained. On the question as to whether section 69 was applicable to the facts of the case or section 69A was applicable, the learned judge did find that the orders passed by the three lower authorities disclosed some confusion about the applicability of one or the other section to the facts of the case. But, according to him, both sections 69 and 69A contained rules of evidence and as such a the provisions thereof would be applicable to any proceedings if they happened to be on the statute book on the date when the trial took place and since it was not disputed that at the time when the

Income-tax Officer held the assessment proceedings before him, section 69A was in existence and in operation the proceedings could legitimately be disposed of by applying the rules of evidence as contained in that section. He took the view that the petitioner having been found to be the owner of the gold, the value thereof could be presumed to be the income from undisclosed source during the relevant period as provided under section 69A of the Act. In other words, the learned judge considered the case of the petitioner by applying the rules of evidence as contained in section 69A of the Act. As regards the fifth contention, the learned judge took the view that the loss suffered by the petitioner consequent upon the confiscation of the gold for infraction of law could not be said to be the commercial loss liable to be deducted while computing the profits or gains of the business nor was such loss liable to be set off under sections 70 and 71 of the Act. In this behalf the learned judge principally relied upon the ratio of the Supreme Court decision in the case of Haji Aziz and Abdul Shakoor Bros. v. Commissioner of Income-tax, which confirmed the view taken by the Bombay High Court in Commissioner of Income-tax v. Haji Aziz and Abdul Shakoor Bros. In Haji Aziz's case dates which were imported from abroad by the assessee in contravention of the provisions of the Sea Customs Act were confiscated by the customs authorities under section 167.81 of the Sea Customs Act but an option was given to the assessee under section 183 of the Act to pay the fine in lieu of confiscation and get the goods released. The assessee exercised the option and got the goods released on payment of fine. In the course of assessment proceedings the assessee claimed deduction of the penalty amount under section 10(2)(xv) of the Indian Income-tax Act, 1922. The Bombay High Court negatived the contention holding that the penalty for infraction of law could not amount to any expenditure laid out or expended wholly or exclusively for the purpose of such business, profession or vocation. The Supreme Court confirmed the view of the Bombay High Court but negatived the claim deduction on a broader ground. The Supreme Court held that an expenditure was not deductible unless it was a commercial loss in trade and a penalty imposed for breach of the law during the course of trade could not be described as such. The Supreme Court further observed that infraction of the law was not a normal incidental of business and, therefore, only such disbursement could be deducted as were really incidental to the business itself and they could not be deducted if they fell on the assessee in some character other than that of a trader. Applying the test as indicated by the Supreme Court in this case, Mr. Justice Deshpande held that confiscation of goods incurred for infraction of law could not be said to be a normal incidental of business and loss suffered therefrom fell on the assessee in some character other than that of a trader. He, therefore, negatived the contention that the loss consequent upon the confiscation of goods suffered by the petitioner nor infraction of law could be allowed as a deductible loss while computing the profits of the assessee's business. The decision of the Punjab and Haryana High Court in the case of Commissioner of Income-tax v. Piara Singh was pressed into service on behalf of the petitioner for contending that the loss consequent upon the confiscation of goods

would be allowable loss while computing the income of the assessee's business, even though the business may be an illegal business. Mr. Justice Deshpande, however, observed that it was not possible for him to agree with the view expressed by the Punjab High Court as expressed in that case. In view of the above conclusions which he reached on each one of the contentions that were urged before them by Mr. Albal on behalf of the petitioner, Mr. Justice Deshpande felt that the petition was liable to be dismissed.

157. It may, however, be stated that out of the five contentions that were urged on behalf of the petitioner, Mr. Justice Mukhi expressed his agreement with the views of Mr. Justice Deshpande on three contentions. Mr. Justice Mukhi did not find any substance in the contention that the assessment order could not have been founded on the judgment and the evidence produced before the criminal court nor did he find any substance in the contention that the findings that were recorded by the income-tax authorities had been recorded in breach or violation of the principle of natural justice. He also agreed with the view of Mr. Justice Deshpande that the question whether the provisions of section 69 were applicable to the facts of the case of the provisions of section 69A were applicable was really immaterial, for, according to him, whether section 69 applied or section 69A applied to the facts of the case, the condition precedent mentioned in each of those sections had to be satisfied before the particular rule of evidence enunciated in either was invoked. He agreed with the view of Mr. Justice Deshpande that it was section 69A that was applicable to the facts of the case notwithstanding that it had come into force only on April 1, 1963, inasmuch as it was a procedural section containing rule of evidence and the said section was in existence when the proceedings were undertaken by the Income-tax Officer. He, however, took the view that before the rule of evidence contained in section 69A could be invoked, the condition precedent as mentioned in that section, namely, that the assessee should be found to be the owner of the bullion (gold) must be satisfied and, according to him, the burden of satisfying that condition precedent was obviously on the department and, according to Mr. Justice Mukhi, the question was whether there was material or evidence on record before the taxing authorities on the basis of which an inference about the ownership of the gold in the petitioner could be reasonably drawn and on that aspect of the matter he has persuaded to take a view different from the view taken by Mr. Justice Deshpande. In other words, on the second contention that was urged on behalf of the petitioner before the Bench, Mr. Justice Mukhi took the view that it was a case of no evidence at all, that is to say, even if the entire material that was placed before the taxing authorities was taken to have been established and was taken into consideration, no reasonable body of persons could come to the conclusion that the petitioner had either made an investment in the gold by purchasing the same or that the petitioner was the owner of that gold. In other words, he took the view that all the facts and circumstances present in the case and which were said to have been proved before the taxing authorities were such that no inference of ownership of the gold in the petitioner could be reasonably drawn from them. In

this view of the matter he felt on this ground alone that the impugned orders were liable to be set aside and it was not necessary for him to decide the question whether the loss consequent upon the confiscation of the goods for infraction of law suffered by the petitioner was allowable deduction in computing his profits or not or whether such loss could be set off against the income from undisclosed source as claimed by the petitioner. However, the learned judge proceeded to consider that question, though he was clearly of the view that the Tribunal was in error in not entertaining and considering the plea of the petitioner for the set-off. On the question as to whether the loss sustained by the petitioner as a result of the confiscation of gold for infraction of law could be claimed by him as deductible loss while computing his income from his business as a dealer in gold, the learned judge expressed the view that the claim of the petitioner was tenable. Differing from the view taken by his learned colleague, Mr. Justice Mukhi felt that if the profits from an illegal business were assessable to tax under the Income-tax Act, there was no reason why loss arising in illegal business should not be taken into account while computing the net profit of the said business and he was persuaded to take the view that the loss suffered on account of confiscation of gold in question - when the trading activity was illegal business of smuggling and dealing in gold - will have to be considered as commercial loss and as such could be claimed to be deducted while computing the net profit of such business and in that behalf Mr. Justice Mukhi has principally relied upon the judgment of the Gujarat High Court in the case ofCommissioner of Income-tax v. S. C. Kothari, which decision has been confirmed by the Supreme Court in Commissioner of Income-tax v. S. C. Kothari and on the decision of the Punjab and Haryana High Court in Piara Singh's case. On this aspect of the matter, however, Mr. Justice Mukhi has expressed his aforesaid view as a prima facie view in the matter, for, according to him, it was up to the Tribunal to have allowed the petitioner to raise this plea and to have adjudicated thereon but since the Tribunal had not allowed the petitioner to raise this plea, an appropriate order would have been to remand the matter to the Tribunal to dispose of that plea in accordance with law and on facts obtaining in the matter. However, since on the second contention he took the view that it was a case of no evidence whatsoever for drawing the inference that the petitioner was the owner of the gold in question, the petitioner was entitled to succeed in getting the impugned orders quashed and he, therefore, felt that the rule deserved to be made absolute by way of quashing the impugned orders.

158. From what I have stated have, it will at once become clear that it is only on two principal points raised in the case that there has been difference of opinion between the two learned judges and, therefore, the matter has been referred to me for final disposal and the two points on which the learned judges have differed are :

(1) Whether it is a case of no evidence whatsoever for drawing an inference of ownership of the gold in question in the petitioner or whether it could be said that there was some material before

the taxing authorities on the basis of which a reasonable body of persons could draw the inference about the ownership of the gold in the petitioner ? and (2) Whether the loss arising from the confiscation of the gold in question for infraction of law sustained by the petitioner falls in the category of commercial loss so as to become an allowable deduction while computing the net profits of the petitioner's business ?

159. It is on these two points that Mr. Albal ably supported by Mr. Pandit for the petitioner has put forward his submissions in support of the petitioner's case and Mr. Hajarnavis appearing for the revenue has made his submissions supporting the view taken by Mr. Justice Deshpande. It is, therefore, not necessary for me to deal with any of the other contentions that were urged before the Division Bench on which there has been agreement between the two learned judges of the Division Bench. I shall, therefore, proceed to consider the aforesaid two questions one after the other.

160. In order to decide the question as to whether it is a case of no evidence at all for drawing the inference of the ownership of the gold in question in the petitioner or whether there was material on record before the taxing authorities on the basis of which reasonable inference about the ownership of the gold in question in the petitioner could be drawn, one will have to see and consider what the material before the taxing authorities was. It is true that there was no direct evidence placed before the taxing authorities to prove that the petitioner had actually invested monies for purchasing the gold in question and had thus become the owner of that gold but the inference of the ownership of the gold in the petitioner rested upon circumstantial pieces of evidence. It is also not disputed that no additional evidence was led before the taxing authorities, except the material that was before the criminal court. The entire material consisted of the proceedings before the criminal court and its judgment and it is from such material that the taxing authorities have drawn the inference that the petitioner was the owner of gold. Certain facts connected with the actual operation undertaken for acquiring the gold - facts emerging from the judgment of the criminal court and proceedings before it - were held to have been proved by the taxing authorities and these facts have been enlisted by Mr. Justice Deshpande in paragraph 11 of the judgment and it would be desirable to set out those facts :

"(1) On 20th April, 1961, the assessee went to his workshop at Moda island and instructed his servants to load ballast on launch, 'Lakshmi', and directed them to proceed towards Bankot the same night.

(2) All the crew members of the said launch were taken to the house of the assessee in the afternoon on that day for taking some instructions.

(3) When the crew members went to the house of the assessee (petitioner) one unknown Muslim

was found along with the petitioner in his room. The assessee told them that the launch was to be taken to Bankot side that night and the unknown Muslim was to accompany them. He further told them that a certain spot another vessel would meet them from which 25 bags will be transferred to the launch, 'Lakshmi', which bags were to be concealed under the ballast. He further asked them to take back 'Lakshmi', launch to Deogad at midnight and come straight to Moda and anchor opposite his workshop, where arrangements would be made to unload the 25 bags. The tindel and crew would report of the arrival of the launch to the customs office the next morning.

(4) In the evening the assessee, Parkar, went to his workshop and satisfied about the arrangements made.

(5) At 11-00 p.m. the crew members were taken to Hambarghat where the assessee was sitting in a black car. The assessee gave them three bags containing coins and told them to deliver them to the launch which was to transfer the bags containing gold.

(6) On April 22, 1961, when the launch was near Janjira light house, an hour after sun-set, they saw a vessel coming towards them from the West. Unknown Muslim accompanying the crew of the launch flashed a torch and the coming vessel too flashed a torch in response. Three bags containing coins were handed over to the other vessel and the 25 bags containing gold were transferred from the other vessel to the vessel, 'Lakshmi'.

(7) The launch then proceeded back to Deogad and came to Moda and anchored opposite the assessee's workshop.

(8) In the meanwhile the crew noticed the custom's tony coming towards them. The customs officers arrived, searched the vessel and detected the gold concealed under ballast of the vessel and seized the same.

(9) In this process the unknown Muslim escaped to the shore and the assessee made arrangements to send him in his black car to Gadniche-Pani.

(10) While the investigation was going on, the assessee contacted the inspector and offered him bribe of Rs. 1 lakh to Rs. 5 lakhs and requested him to throw the gold in the sea or retain the same with himself and to save him from disgrace."

161. Apart from the aforesaid facts which pertained to the actual operation undertaken for acquiring the gold in question, the Income-tax Officer also took note of the previous history of the assessee's case with regard to his business which he has dealt with in paragraph 3 of his order and the previous history testified to the facts that the petitioner assessee and his brother started

independent business in year 1948 and purchased five launches for Rs. 2 lakhs from Lotus Line Ltd., that the total fleet of launches at the end of 1949 was 10 and that the firm was converted into a private limited company in the year 1955, that it owned a building at Sasson Dock, Bombay, and that the nominal capital of the company was Rs. 5 lakhs and other capital for consideration other than cash was about Rs. 1,80,000 which was distributed among the Parkar family and relatives. It was in the light of this background and the facts connected with the actual operation undertaken for acquiring the gold which appeared clear from the record that the income-tax authorities came to the conclusion that the assessee must have paid the price for the gold that the smuggled to his workshop at island, Moda. The taxing authorities further came to the conclusion that the assessee had become to owner of the gold in question which was so detected in his launch and seized by the customs authorities by paying the price therefor and they further concluded that the value of the gold not having been disclosed by the assessee in his return, the same will be his income from his undisclosed source and thus computed the total income to the tune of Rs. 70,98,834 including the value of the gold in question, which, as stated earlier, was reduced from Rs. 70,78,584 to Rs. 47,19,056. It appears that before the Tribunal a plea was put forward by counsel for the petitioner that the petitioner-assessee was merely a carrier of the gold and a suggestion was thrown that the unknown Muslim who managed to escape might be the owner of the gold (though no such plea nor the suggestion was put forward by the assessee before the Income-tax Officer or the Appellate Assistant Commissioner, but the Tribunal rejected the same and upheld the findings of the lower authorities. The reasoning adopted by the Tribunal for doing so has been split by Mr. Justice Deshpande in about 8 propositions which were stated by the Tribunal in its order as follows :

"(1) The plea of the assessee that he was only a carrier of somebody else is without any proof.

(2) The assessee was convicted along with others for knowingly and with the intention to defraud the Government of India of the duty payable on the gold weighing 49,990 tolas of which he acquired the possession by committing the breach of the provisions with regard to the possession and importing of the gold.

(3) If the assessee was merely a carrier, there would have been some evidence to show on whose behalf he was acting or for whom the goods were intended.

(4) Not much importance can be attached to the role played by the unknown and mysterious Muslim. He could have been there only with a view to identify the foreign ship and bring the gold on board the assessee's launch 'Lakshmi'. He would not have been allowed to slip away by the crew of 'Lakshmi' had he really been the owner of the gold, as after being chased by the customs officials, they would have realised that they would have been answerable for the presence of the contraband gold in the launch.

(5) Offer of bribe to the customs officials by the assessee is inconsistent with any other position than that the assessee being the owner of the gold and the assessee's direct interest therein.

(6) The fact remains that the assessee had been found in possession of a large quantity of gold. It was up to him to prove how he paid for it and how it came into his possession.

(7) It is impossible to believe that a foreigner would have handed over such a large quantity of gold without receiving the consideration therefor. The risk involved in smuggling gold is well know, where the penalty on detection is complete confiscation. It will, therefore, be opposed to all human conduct that an unknown foreigner would have handed over the goods without receiving the price thereof. The natural presumption in the circumstances of the case can only be that the assessee had paid for it.

(8) The assessee had failed to prove the source for this investment and, in our opinion, the department was justified in treating the cost of the gold acquired by the assessee as having come out of the undisclosed income of the assessee."

162. Apart from the reasoning of the Tribunal whereby it rejected the plea that the petitioner was merely a carrier of the gold, three facts which stand out glaringly on the record, are, in my view, sufficient to support the inference about the ownership of the gold being with the petitioner. In the first place, the several circumstances connected with the operation undertaken for acquiring the gold clearly establish the fact that it was the petitioner who had the lead, initiative, drive and overall control of the entire operation. Secondly, the principal fact is that the gold in question was seized from the motor-launch belonging to the petitioner and as such it was the petitioner who was in possession of such gold. Thirdly, there is the conduct on the part of the petitioner in offering bribe to the tune of Rs. 5 lakh to the inspector and his further request to the inspector either to throw away the gold into the sea or retain the same for himself and to save him (the petitioner) from disgrace. His said conduct and his suggestion to the inspector to deal with or dispose of the gold as the latter liked (inspector could throw it in the sea or keep it for himself) clearly indicates the extent of the power of disposition of the petitioner over the said gold. These three facts constituted sufficient material on record from which the requisite inference could be reasonably drawn. There is yet one more fact on record which could be said to be relevant for drawing that inference, viz., that in exchange of 25 bags containing gold biscuits 3 bags containing coins were handed over to the other vessel on the night in question which suggests payment of consideration for acquisition of the gold in question. It seems that in the criminal court not much reliance was placed upon this fact by the prosecutor, presumably on the footing that the coins contained in 3 bags may not be adequate price said to have been paid for the 25 bags of gold biscuits which were received by the crew of "Lakshmi". It is not understood as to why this fact which came on record was not relied upon, especially when the size of the bags

containing the coins had not come on record. In the absence of material showing what were the sizes of the 3 bags it cannot be said that the coins contained therein could never represent the price of the gold obtained in exchange. Even otherwise, it is not understood as to why the parting of 3 bags containing coins could not be regarded as part consideration paid for the gold that was acquired and this fact, in my view, though it was not relied upon in the criminal court, could be a factor which could be relied upon by the taxing authorities, for it showed that at least part of the consideration for acquiring the gold proceeded from the petitioner. But, apart from this fact, the other three pieces of circumstantial evidence mentioned earlier clearly constitute such material that in the face of the same it would be difficult to say that no reasonably body of the persons would come to the conclusion that the gold in question was of the ownership of the petitioner. The aforesaid three pieces of circumstantial evidence were sought to be explained away by Mr. Albal - each in a different manner - and he, therefore, urged that the circumstances, being of equivocal nature, do not necessarily lead to the conclusion that the petitioner was the owner of the gold. It must, however, be remembered that the proceedings before the taxing authorities were not criminal proceedings but proceedings of a civil nature where the question about the ownership of gold in question was required to be decided not beyond a shadow of doubt but by adopting the test of preponderance of probabilities; moreover it is well settled that the jurisdiction of this court under article 226 or article 227 is not that of a court of appeal and under writ jurisdiction this court cannot consider the question of adequacy or sufficiency of evidence but it can only consider whether the materials or circumstances are such that the inference drawn is capable of being rationally drawn and if there be such materials on record this court will not interfere.

163. It may be mentioned that before the Division Bench reliance was placed upon the provisions of section 110 of the Evidence Act which deals with possessory title and it was urged that on the basis of the principles enunciated therein it was perfectly open to the income-tax authorities to draw the inference that the petitioner was the owner of the gold in question. Section 110 runs as follows :

"When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner."

164. Relying upon the aforesaid provision it was contended that since the gold in question was found in the possession of the petitioner, it was open to the taxing authorities to draw the inference of ownership of that gold in the petitioner as the petitioner had failed to discharge the burden that lay on him. The fact that the gold in question was found in the possession of the petitioner was never in dispute and it was not disputed by Mr. Albal in this court. He, however,

urged that when the petitioner was tried for offences under the Indian Penal Code, the Sea Customs Act and the Foreign Exchange Regulation Act, the ownership of the gold was not in issue and as such his convictions cannot have any bearing on this issue of ownership. That undoubtedly is true but the taxing authorities have not found the ownership of the gold in the petitioner because of the convictions recorded against him but from the unexplained possession of the gold with him and from other facts stated above. As regards unexplained possession of the gold and the inference of ownership of that gold being drawn against the petitioner on the principle enunciated in section 110 of the Evidence Act, Mr. Albal urged a two-fold contention. Firstly, it was contended by him before me as well as before the Division Bench that it was an admitted position that the provisions of the Evidence Act including section 110 were not applicable to the proceedings under the Income-tax Act and I may say that Mr. Justice Mukhi was persuaded to take the view that because the provisions of the Evidence Act were not applicable to the taxation proceedings, section 110 could not be invoked or availed of in the petitioner's case and no reliance could be placed on that section. It is not possible to accept this contention of Mr. Albal for more than one reason. In the first place, what is meant by saying that the Evidence Act is not applicable to the proceedings under the Income-tax Act is that the rigour of the rules of evidence contained in the Evidence Act is not applicable but that does not mean that if the taxing authorities are desirous of invoking the provisions of that Act in proceedings before them they are prevented from doing so.

165. Secondly, all that section 110 of the Evidence Act does is that it embodies a salutary principle of common law jurisprudence which could be attracted to a set of circumstances that satisfy its conditions. In this context I might usefully refer to what the Supreme Court has stated in the case of State of Punjab v. Sodhi Sikhdev Singh. At page 444 the court has observed thus :

"..... it has often been stated with justification that Sir James Stephen has attempted to crystallize the principles contained in Taylor's work into substantive propositions." If one turns to article 123 in Taylor's Treatise on Law of Evidence (volume I, 11th edition, at page 130) it will appear clear that the substantive proposition enunciated in section 110 of Evidence Act is based on the principle contained in that article which runs as follows :

"123. As men generally own the property they possess, proof of possession is presumptive proof of ownership. This rule applies both to real and personal property, and, in the former case, raises a presumption of a seisin in fee."

166. In other words, the rule of evidence as enunciated in section 110 of the Evidence Act is one of the common law principles which could be invoked in any proceedings where the set of circumstances satisfy its conditions, that is to say, proof of possession would be proof of ownership unless possession is satisfactorily explained in any other manner.

167. Secondly, Mr. Albal contended that when the petitioner was called upon to explain his possession of the gold before the Income-tax Officer his conviction was the subject-matter of appeal that he gave a brief reply by contending that his conviction was wrong, that his conviction was based on false evidence and that he was not in possession of the gold in question. Mr. Albal contended that since the appeal was pending before the Supreme Court the petitioner could not have given any explanation on the assumption that he was in possession as it might have put him in further jeopardy. I am unable to accept this contention. The initial proceedings before the criminal court were over, wherein the petitioner had been convicted for being in possession of the contraband gold and for being concerned with smuggling activities in respect of that gold. This conviction had been confirmed even by the High Court and only an appeal against the conviction and sentence was pending before the Supreme Court and nothing prevented him from giving any explanation before the Income-tax Officer without prejudice to his contentions in the appeal and that too on the assumption that he had possession of the gold and such explanation would never have prejudiced the petitioner in the prosecution of his appeal in the Supreme Court. That apart, the only explanation of his possession of the gold in question offered before the Tribunal along after the Supreme Court had disposed of the appeal was that the petitioner was merely a carrier of the gold and not the owner of it. In my view, such a plea could have been easily made by him before the Income-tax Officer without jeopardising his appeal before the Supreme Court for even in the criminal court of the first instance such a plea in the alternative could have been made and it could not be regarded as being in conflict with or incongruous with the stand that he was not in possession of the gold on his account or was not in any way concerned with smuggling of that gold. The position, therefore, is that the petitioner simply denied the possession of the gold in question and did not offer any other explanation on the assumption that he was in possession of that gold. Besides, the explanation that was offered at the stage of the appeal before the Tribunal was that he could be in possession of the gold as a carrier and that explanation was rejected by the Tribunal and, in my view, rightly. In the circumstances the principle enunciated in section 110 at once came into play and, in my view, the taxing authorities as also the Tribunal were entitled to draw the inference of ownership of the gold being with the petitioner.

168. Mr. Albal, however, contended that the possibility of the petitioner being a carrier of the gold and the unidentified Muslim who escaped during the operation on the night in question being the owner of that gold had not been ruled out, and in that behalf he pointed out that there was some circumstances on record which showed that the Muslim gentleman might be the owner of the gold and the petitioner may be the carrier of the gold. He relied upon the fact that, after the exchange of the bags containing gold with the bags containing the coins, the Muslim gentleman travelled with the launch, "Lakshmi", and returned to Moda island. According to Mr. Albal, he would not have travelled back to Moda island in the launch "Lakshmi" if he were not interested in the gold and if he were merely a person who had brought about the transaction as a broker or

entered into it as the seller of gold he would have gone away in that foreign vessel. From the above circumstances it is not possible to accept the contention urged by Mr. Albal. In the first place, it is quite possible that the Muslim gentleman might have travelled to Moda island by the launch, "Lakshmi", with a view to receive his brokerage or commission from the petitioner which would normally be paid after the gold had been carried to the shore, and as such the mere fact that he travelled back to Moda island in the launch, "Lakshmi", would not be a circumstance to show that he must be the owner of the gold in question. Secondly - and this is clinching - the evidence on record is that in the operation that was undertaken on the night in question the Muslim gentleman somehow or the other managed to escape to the shore but thereafter it was the petitioner who had made arrangements to send him in his black car to Gadniche-Pani. Now the position that had emerged on that night was the petitioner and his associates had realised that the Customs authorities had chased their launch, "Lakshmi", which admittedly carried the gold in question and obviously the petitioner would be answerable for such seizure of the gold from his own launch. Placed in that situation it is difficult to appreciate how that Muslim gentleman, if he were the real owner of the gold, was not merely allowed to escape but arrangement was made by the petitioner to send him away by providing his own car. Such conduct on the part of the petitioner runs counter to his plea that the Muslim gentleman could be the owner of the gold in question and that he was merely a carrier of the gold. In my view, the Tribunal has rightly rejected that plea of the petitioner.

169. Having regard to the aforesaid discussion, four of five facts stand out clearly on record, namely, it was the petitioner who had the lead, initiative, drive and overall control on the operation undertaken for acquiring the gold, it was he who had the possession of the gold, it was he who had offered a bribe up to Rs. 5 lakhs to the inspector and had requested the inspector to dispose of the gold in such manner as he (inspector) liked but save him from disgrace, it was from him that consideration (at least in part) had flowed for acquiring the gold and it was he who had allowed the Muslim gentlemen to escape which he would not have done if the latter were the owner of the gold. In view of these facts and circumstances, it is abundantly clear to me that there was material on record on the basis of which a reasonable body of persons could rationally come to the conclusion that the gold in question belonged to the petitioner and he was the owner of the gold. As stated earlier, the adequacy or sufficiency of the material is not for this court to decide and since there was material from which the inference that the petitioner was the owner of the gold in question could be reasonably drawn, this court will not interfere with that finding of fact recorded by the taxing authorities and the Tribunal.

170. The next contention urged by Mr. Albal on behalf of the petitioner was that since admittedly the entire gold seized had been confiscated by the Collector of Central Excise by order dated September 18, 1961, the petitioner had completely lost that gold for all times, and as such the

value of this gold that was lost on account of confiscation should have been treated as a trading loss and allowed to have been deducted while computing his net income from the business of dealing in gold under section 28 of the Act of 1961 (equivalent to section 10(1) of the Act of 1922) or such loss should have been allowed to be set off against the estimated and assessed income from undisclosed source under sections 70 and 71 of the Act of 1961 (equivalent to section 24 of the Act of 1922). The contention was that nobody would acquire such large quantity of gold merely for the pleasure of possessing it and that the very circumstance involved the idea of adventure in the nature of trade and as the stock had been lost the petitioner assessee was entitled to the deduction.

171. In support of his aforesaid contention reliance was placed upon the decision of the Gujarat High Court in Commissioner of Income-tax v. S. C. Kothari, which decision was later on confirmed by the Supreme Court in Commissioner of Income-tax v. S. C. Kothari and also upon the decision in Commissioner of Income-tax v. Piara Singh. In S. C. Kothari's case, the facts were that the assessee had, inter alia, entered into two classes of contracts in groundnut oil, groundnut seeds and groundnut cakes, one of which consisted of forward contracts which were admittedly not in violation of any prohibition imposed under the Forward Contracts (Regulation) Act, 1952, while the other consisted of forward contracts which, according to the revenue, were in violation of the prohibition imposed under sections 15(1) and 15(4) of that Act, that the assessee obtained a profit in the first class of contracts and incurred a loss in the latter class, that the assessee also obtained profit in its other business which did not consist of forward contracts. The claim of the assessee to set off the loss in the latter class of forward contracts against its profits in the former class of forward contracts as well as other businesses was negatived by the Income-tax Officer on the ground that, as the forward contracts which resulted in a loss were illegal, being hit by sections 15(1) and 15(4) of the Forward Contracts (Regulation) Act, 1952, and were not saved by section 18, the loss arising therefrom was not liable to be taken into account in computing the total income of the assessee. On appeal, the Appellate Assistant Commissioner took the same view and held that the loss could not be taken into account as the forward contracts were illegal. On further appeal, the Tribunal held that the forward contracts in question under which the loss was incurred were valid and legal and hence the loss arising therefrom had to be taken into account as loss from business. On a reference made on behalf of the department, the Gujarat High Court held that the impugned forward contracts in which loss had been incurred were unlawful, but even so the High Court held that such loss was liable to be taken into account in computing the business income of the assessee. The Gujarat High Court took the view that even where a trade is illegal, it would still be a trade within the meaning of the Income-tax Act and that there could be no distinction between profits and losses of such business and if the profits of an illegal business were assessable to tax, equally the losses arising from illegal business must be held to be liable to be taken into account in computing the income of the

assessee. This view of the Gujarat High Court has been confirmed by the Supreme Court in Commissioner of Income-tax v. S. C. Kothari. In paragraph 6 of its judgment this is what the Supreme Court has observed :

"If the business is illegal neither the profits earned nor the losses incurred would be enforceable in law. But that does not take the profits out of the taxing statute. Similarly the taint of illegality of the business cannot detract from the losses being taken into account for computation of the amount which can be subjected to tax as 'profits' under section 10(1) of the Act of 1922. The tax collector cannot be heard to say that he will bring the gross receipts to tax. He can only tax profits of a trade or business. That cannot be done without deducting the losses and the legitimate expenses of the business. We concur in the view of the High Court that for the purpose of section 10(1) the losses which have actually been incurred in carrying on a particular illegal business must be deducted before the true figure relating to profits which have to be brought to tax can be computed or determined."

172. Relying upon the aforesaid decision of the Gujarat High Court which was confirmed by the Supreme Court, Mr. Albal contended that in the instant case in the single adventure on the part of the assessee in dealing in contraband gold or smuggled gold the assessee was entitled to claim the loss arising from confiscation of the gold in question which was his stock-in-trade as allowable deduction before computing his true profits of his said business. He also relied upon the judgment of the Punjab and Haryana High Court in the case of Commissioner of Income-tax v. Piara Singh, where the view of the Gujarat High Court in S. C. Kothari's case was not merely approved but strongly relied upon for coming to the conclusion that the loss suffered by an assessee an amount of confiscation of cash amount of Rs. 65,500 from him by the customs authorities was a trade loss and was liable to be taken into account while arriving at the net figure of profits of the business under section 10(1) of the Act of 1922. In that case the assessee was carrying on regular smuggling activities which consisted of taking out Indian currencies and exchanging them with gold in Pakistan and smuggling that gold into India. On the night between 19th and 20th September, 1958, when the assessee along with his companion was moving towards a village on the Pakistan side he was caught by the customs authorities and cash to the tune of Rs. 65,500 was recovered from him and was later on confiscated. In the assessment proceedings the assessee was called upon to explain the source of currency notes, amounting to Rs. 65,500 that was seized and confiscated from him. His explanation was not accepted fully. But after holding that he could not have saved more than Rs. 5,000 from his agricultural income the taxing authority treated the amount of Rs. 65,500 as his income from undisclosed source. When the matter was carried to the Tribunal it was contended on behalf of the assessee that the amount that was confiscated, viz., Rs. 65,500, was loss in the business activities of smuggling and, therefore, was allowable deduction under section 10(1) of the Act of 1922. The Tribunal

accepted the contention and on a reference made to the Punjab High Court on behalf of the department, the Punjab High Court held that the loss sustained by the assessee as a result of confiscation of cash amount from him will have to be regarded as a trade lost and could be claimed as allowable deduction under section 10(1) of the Act. The High Court observed as follows :

"As the hazard of losing the money with which the gold had to be acquired was inherent in the activity, any confiscation of that amount would be a loss and thus allowable deduction within the meaning of section 10(1)."

173. Mr. Albal contended that in the instant case also it was a case of loss, sustained consequent upon confiscation of the gold in question which was nothing but a stock-in-trade belonging to the assessee and as the hazard of losing the same was inherent in the activity of dealing in smuggled gold, the same could be regarded as allowable deduction under section 28 of the Act of 1961 (equivalent to section 10(1) of the Act of 1922).

174. On the other hand, Mr. Hajarnavis appearing for the revenue has relied upon the decision of the Bombay High Court in Commissioner of Income-tax v. Haji Aziz and Abdul Shakoor Bros.,which decision was confirmed by the Supreme court in Haji Aziz and Abdul Shakoor Bros. v. Commissioner of Income-tax. He fairly conceded that in that case the deduction was claimed in respect of fine paid in lieu of confiscation by the assessee under section 167.81 read with section 183 of the Customs Act as an item of expenditure claimable under section 10(2)(xv) of the Indian Income-tax Act, 1922 and the deduction was not claimed under section 10(1) of the Income-tax Act. But he pointed out that the Supreme Court had confirmed the Bombay High Court decision in disallowing the deduction claimed on a broader base and not merely on the ground that the expenditure did not strictly fall within the purview of clause (xv) of section 10(2) of the Act of 1922, as had been done by the Bombay High Court. In that case the assessee imported dates from Iran by steamers in contravention of certain notifications and the same were confiscated by Customs authorities under section 167.81 of the Sea Customs Act but the assessee paid the prescribed fine for getting the goods released in pursuance of an option given to him under section 183 of the Sea Customs Act. The assessee claimed a deduction of this amount of fine as an allowable deduction under section 10(2)(xv) of the Indian Income-tax Act, 1922. The Bombay High Court took the view that the amount of fine could not be said to have been paid for salvaging the goods but was paid as penalty incurred in consequence of an illegal act on the part of the assessee and was, therefore, not an allowable item under section 10(2)(xv) of the Act. In other words, the High Court took the view that the expense incurred could not be said to have been laid out or expended for the purpose of carrying on business of the assessee lawfully and, therefore, the same could not fall within the ambit of section 10(2)(xv). Mr. Hajarnavis, however,

pointed out that when the matter was taken to the Supreme Court that court confirmed the view of this court on a slightly broader ground by observing in paragraph 15 of the judgment as follows :

"It is not enough that the disbursements are made in the course of or arise out of or are concerned with or made out of the profits of the business but they must also be for the purpose of earning the profits of the business. As was pointed out in Von Glehn's case, an expenditure is not deductible unless it is a commercial loss in trade and a penalty imposed for breach of the law during the course of trade cannot be described as such. If a sum is paid by an assessee conducting his business, because in conducting it he has acted in a manner which has rendered him liable to penalty it cannot be claimed as a deductible expense. It must be a commercial loss and in its nature must be contemplate as such. Such penalties which are incurred by an assessee in proceedings launched against him for an infraction of the law cannot be called commercial losses incurred by an assessee in carrying on his business. Infraction of the law is not a normal incident of business and, therefore, only such disbursements can be deducted as are really incidental to the business itself. They cannot be deducted if they fall on the assessee in some character other than that of a trader. Therefore, where a penalty is incurred for the contravention of any specific statutory provision, it cannot be said to be a commercial loss falling on the assessee as a trader the test being that the expenses which are for the purpose of enabling a person to carry on trade for making profits in the business are permitted but not if they are merely connected with the business."

175. Mr. Hajarnavis further pointed out that the Supreme Court in the course of its judgment relied upon certain observations occurring in an English decision in the case of Commissioners of Inland Revenue v. E. C. Warnes & Co. Ltd. The assessee who carried on the business of oil exporters were sued for a penalty on an information exhibited by the Attorney-General under the Sea Customs Consolidation Act for breach of orders and proclamations. The matter was settled by consent on the assessee agreeing to pay a mitigated penalty of Pound 2,000 All imputations on the moral culpability of the assessee were withdrawn. The provisions of the Act under which as information was lodged and penalty paid was similar to the provisions of the Indian Sea Customs Act. This amount was held not to be a proper deduction because in order to be within the provision similar to section 10(2)(xv) of the Indian Act the loss had to be something within commercial contemplation and in the nature of a commercial loss. Rowlatt J., at page 452, has observed as follows :

"..... but it seems to me that a penal liability of this kind cannot be regarded as a loss connected with or arising out of a trade. I think that a loss connected with or arising out of a trade must, at any rate, amount to something in the nature of a loss which is contemplable and in the nature of a

commercial loss. I do not intend that to be an exhaustive definition, but I do not think it is possible to say that when a fine - which is what the penalty in the present case amounted to - has been inflicted upon a trading body, it can be said that that is a 'Loss connected with or arising out of' the trade within the meaning of this rule."

176. This statement of law was approved in the case of Commissioners of Inland Revenue v. Alexander Von Glehn & Co. Ltd., where also in similar circumstances by consent of the assessee penalty of Pounds 3,000 was paid and the penalty plus the costs were claimed as deduction in arriving at the profits. Rowlatt J. on a reference held it to be a non-deductible item and the judgment was upheld on appeal by the Court of Appeal. Warrington L. J. made the following observations :

"It is a sum which the persons conducting the trade have had to pay because in conducting it they have so acted as to render themselves liable to this penalty. It is not a commercial loss, and I think when the Act speaks of a loss connected with or arising out of such trade it means a commercial loss connected with or arising out of the trade."

177. Lord Sterndale in this case observed as follows :

"During the course of the trading this company committed a breach of the law. As I say, it has been agreed that they did not intend to do anything wrong in the sense that they were willingly and knowingly sending these goods to an enemy destination; but they committed a breach of the law, and for that breach of the law they were fined. That, as it seems to me, was not a loss connected with the business, but was a fine imposed upon the company personally, so far as a company can be considered to be a person, for a breach of the law which it had committed. It is perhaps a little difficult to put the distinction into very exact language, but there seems to me to be a difference between a commercial loss in trading and a penalty imposed upon a person or a company for a breach of the law which they have committed in that trading. For that reason I think that both the decisions of Rowlatt J., in this case, and his former decision in Commissioners of Inland Revenue v. E. C. Warnes & Co. Ltd., which he followed were right, and that this appeal should be dismissed with costs."

178. The above observations in the two English cases were approvingly quoted by the Supreme Court in Haji Aziz's case and relying on these authorities Mr. Hajarnavis contended that in the instant case the loss consequent upon the confiscation of goods for an infraction of law could not be regarded as a commercial loss or a loss arising out of carrying on of the business or incidental to it. Mr. Hajarnavis further submitted that the fact that deduction in Haji Aziz's case was claimed under section 10(2)(xv) of the Income-tax Act was not of much consequence, for, according to him, where deduction was claimed under section 10(1) of the Act or under section 10(2) of the

Act, the question that was required to be considered by the court was whether in the former case a loss in respect of which deduction is claimed, is a commercial loss or business loss or not and in the latter case whether the expense in respect of which deduction is claimed is a business expenditure or not and looked at from this point of view, the loss arising out of confiscation of goods for an infraction of law suffered by an assessee would stand on the same footing as an expenditure incurred by way of a fine imposed upon an assessee for an infraction of law and since in the former case the loss could not be regarded as commercial or business loss and since in the latter case the expenditure could not be regarded as business expenditure laid out for the purpose of carrying on business, no deduction could be allowed. He, therefore, urged that the petitioner in the case was not entitled to claim this particular deduction. Since in this case the loss consequent upon the confiscation of the gold in question suffered by the assessee is being sought to be deducted as an allowable deduction while computing the assessee's net profits from his single adventure of dealing in gold, the relevant provisions required to be considered are those contained in section 28 of the Income-tax Act, 1961 (which is equivalent to section 10(1) of the Act of 1922), and it is well settled that every type of loss suffered by an assessee as a businessman is not permitted to be deducted under the said provision. The tests by reference to which such loss qualifies itself to earn a deduction while computing net profits of the business have been clearly laid down by the Supreme Court in the leading case of Badridas Daga v. Commissioner of Income-tax. In that case the question that arose for consideration was whether monies embezzled by an agent or employee were allowable as deduction in computing the profits of the business under section 10 of the Act and the claim for deduction in respect of embezzled monies was put forward on three grounds : (a) that the loss sustained by reason of embezzlement was a bad debt allowable under section 10(2)(xv) of the Act; (b) that it was a business expense falling within section 10(2)(xv) of the Act and (c) that it was a trading loss, which must be taken into account in computing the profits under section 10(1) of the Act. The claim for deduction on the first two grounds was negatived by the Supreme Court but it was allowed on the third ground, namely, that it was a trading loss, which should be taken into account in computing the profits under section 10(1) of the Act. After referring to Lord Russell's observations in the case of Commissioner of Income-tax v. Chitnavis to the effect that :

"What are chargeable to income-tax in respect of a business are the profits and gains of a year; and in assessing the amount of the profits and gains of a year account must necessarily be taken of all losses incurred, otherwise you would not arrive at the true profits and gains."

179. And after referring to Lord Halsbury's observations in the case of Gresham Life Assurance Society v. Styles to the effect that :

"The word 'profits' is to be understood in its natural and proper sense in a sense which no

commercial man would misunderstand."

180. The Supreme Court at page 15 has observed as follows :

"The result is that when a claim is made for a deduction for which there is no specific provision in section 10(2), whether it is admissible or not will depend on whether, having regard to accepted commercial practice and trading principles, it can be said to arise out of the carrying on of the business and to be incidental to it. If that is established, then the deduction must be allowed, provided of course there is no prohibition against it, express or implied, in the Act."

181. In the case of Commissioner of Income-tax v. Nainital Bank Ltd. the Supreme Court has summarised the position in the following words :

"We may now summarise the legal position thus. Under section 10(1) of the Act the trading loss of a business is deductible for computing the profits earned by the business. But every loss is not so deductible unless it is incurred in carrying out the operation of the business and is incidental to the operation. Whether loss is incidental to the operation of a business is a question of fact to be decided on the facts of each case, having regard to the nature of the operations carried on and the nature of the risk involved in carrying them out. The degree of the risk or its frequency is not of much relevance but its nexus to the nature of the business is material."

182. I have already indicated above that in Haji Aziz's case while dealing with penalty or fine imposed in lieu of confiscation of goods, the Supreme Court has observed that the penalty suffered by an assessee for an infraction of law cannot be regarded as incidental to the business and in fact it falls upon the assessee in some character other than that of a trader. In my view, the aforesaid authorities make the position very clear that before any loss could be claimed as deductible loss under section 10(1) of the Act, it must be a trading loss or commercial loss arising out of carrying on business or it must be incidental to the business and such loss must also fall on the assessee in his character as a trader. The question in the present case is as to whether the loss consequent upon confiscation of goods for an infraction of law suffered by the assessee could be regarded as a commercial loss or could it be said to be loss incidental to the business and, what is of importance, could it be said to have been suffered by him in his character as a trader ? In my view, it is certainly not a commercial loss arising from carrying on of the business nor can it be regarded as incidental to the activity of the assessee as dealer in gold; moreover, it cannot be regarded as loss falling upon the assessee in his character as a trader. It is a loss falling upon him as a person who had infracted law. The loss suffered by confiscation of goods directly sprang from an illegal act committed by the assessee, namely, having acquired gold without requisite permit or permission of the Reserve Bank of India and without having paid any duty for the import thereof into India. Surely, the loss has not fallen on the assessee as a trader or

businessman, for, obviously, even a lay person who is not a businessman, if he were to import gold for his private use without requisite permission and without payment of customs duty, would subject himself to the penalty of having that gold confiscated from him and he would as a consequence suffer great loss. It is thus clear that the loss consequent upon confiscation of goods for infraction of law suffered by the assessee must be regarded as loss falling upon him in some character other than a trader. In this view of the matter, I am clearly of the view that the petitioner is not entitled to claim the loss suffered by him as a result of confiscation of the gold in question as allowable deduction while computing his business income under section 28 of the Act.

183. So far as the decision of the Gujarat High Court in S. C. Kothari's case is concerned - which decision has been confirmed by the Supreme Court - it must be observed that the judgment is an authority only for the proposition that illegality of any business is irrelevant for the purpose of computing the net income thereof under the Income-tax Act and while the revenue is entitled to levy tax on the income of the assessee earned even from unlawful business, the assessee is also entitled to insist on deduction of loss arising out of such unlawful business. There could be no quarrel with this statement of law which has been approved by the Supreme Court. But even there, the loss in respect of which deduction could be claimed while computing the profits of the unlawful business must be a trade loss or commercial loss or loss incidental thereto but suffered by the assessee in his character as a trader and not loss suffered as a result of confiscation of goods for an infraction of law which would be a loss suffered by him in some capacity other than as a trader. Besides, in S. C. Kothari's case neither the Gujarat High Court nor the Supreme Court had to consider the question whether the loss suffered by way of penalty or confiscation of goods amounted to commercial loss or not. In fact, while setting out the facts of the case it has been stated by the Supreme Court in paragraph 1 of its judgment that the loss of Rs. 3,40,000 and odd which was claimed as deductible loss had arisen out of certain transactions entered into by the assessee with different people for the supply of groundnut oil and it was expected by the assessee that those contracts would be performed but owing to certain reasons some of the contracts could not be performed and difference has to be paid. From this it appears clear that the loss of Rs. 3,40,000 which was claimed as deductible loss was clearly in the nature of commercial or trade loss for which deduction was claimed under section 10(1) of the Act. In the circumstances, it is clear that the statement of law enunciated in the case of S. C. Kothari is unexceptionable but, with respect, I would like to point out that the decision is no authority for the proposition that the loss suffered by way of penalty or confiscation of goods amounts to commercial loss that could be deducted while computing the net profits of a business under section 10(1) of the Act. It is true that in Piara Singh's case, the Punjab and Haryana High Court has taken the view that the confiscation of cash amount of Rs. 65,500 from the assessee, who was engaged in the business activity of smuggling gold, amounted to trade loss and hence was deductible under section 10(1) of the Act. But for coming to that conclusion the Punjab High Court has principally relied upon

the decision of the Gujarat High Court and of the Supreme Court in S. C. Kothari's case, in which, as I have stated above, neither the Gujarat High Court nor the Supreme Court was required to consider the question whether the loss arising from penalty or confiscation of goods for an infraction of law amounted to trade loss or commercial loss; in fact admittedly the nature of loss suffered by the assessee was commercial since it had arisen on account of payment of differences. With great deference, I am unable to persuade myself to agree with the view of the Punjab High Court expressed in Piara Singh's case, especially when it runs counter to the tests laid down by the Supreme Court in Haji Aziz's case and in English cases to which the Supreme Court has referred while deciding Haji Aziz's case. The other contention that this loss should be allowed to be set off against the income from undisclosed source under section 70 or section 71 was not pressed by Mr. Albal.

184. In view of the above discussion, on both the points on which there was difference of opinion between the two learned judges I am in agreement with the views expressed by Mr. Justice Deshpande. In the result, the petition, in accordance with the majority view, is liable to be dismissed. The same is, therefore, dismissed. In all the circumstances, there will be no order as to costs.