

**(1992) 11 BOM CK 0095**

**Bombay High Court**

**Case No:** Income-tax Reference No. 417 of 1977

Commissioner of Income Tax

APPELLANT

Vs

Ramchandra Shivnarain

RESPONDENT

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**Date of Decision:** Nov. 13, 1992

**Acts Referred:**

- Income Tax Act, 1961 - Section 43(5)

**Citation:** (1993) 114 CTR 323 : (1993) 201 ITR 862 : (1993) 70 TAXMAN 138

**Hon'ble Judges:** U.T. Shah, J; B.P. Saraf, J

**Bench:** Division Bench

**Advocate:** Dr. V. Balasubramaniam, for the Appellant; Arun Sathe, for the Respondent

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### **Judgement**

Dr. B.P. Saraf, J.

By this reference u/s 256(1) of the Income Tax Act, 1961, made at the instance of the Commissioner of Income Tax, the Income Tax Appellate Tribunal, Bombay Bench, Bombay has referred the following question of law to this court for opinion :

"Whether, on the facts and in the circumstances of the case, the losses of Rs. 34,870 and Rs. 8,148 sustained by the assessee in the "hessian hedge account" and the "gunny hedge account", respectively, represent business losses and not speculation losses ?"

2. The assessee is a firm carrying on business in the purchase and sale of cloth, jute, barden, etc. The assessment year is 1971-72. During the relevant previous year, the hessian account showed a profit of Rs. 1,32,044 in a business of 970 bales against which a loss in the hessian hedge account of Rs. 34,870 was claimed as loss from ready business. Similarly, a sum of Rs. 8,148 was claimed as loss incurred in the barden hedge account. The Income Tax Officer disallowed both these losses on the ground that they were in the nature of speculation losses as the contract had been settled otherwise than by delivery.

3. The matter was taken up in appeal by the assessee. The Appellate Assistant Commissioner of Income Tax observed that the forward transaction in question were admittedly entered into by the assessee in the course of its merchanting business to guard against loss through future price fluctuations in respect of its contract for actual delivery of merchandise sold by it. He accordingly held that the said transactions were covered by proviso (a) to section 43(5) of the Act, and were, therefore, not speculative transactions. The Revenue took up the matter in appeal to the Tribunal. Before the Tribunal, the only contention of the Revenue was that proviso (a) to section 43(5) was applicable only to manufacturing business and not to merchandise. The contention of the Revenue did not find favour with the Tribunal. The Tribunal arrived at a finding of fact that the forward transactions were admittedly entered into by the assessee in the course of its merchanting business to guard against loss through future price fluctuations in respect of its contracts for actual delivery of merchandise sold by it. On the basis of this finding, the Tribunal held that the case was fully covered by proviso (a) to section 43(5) of the Act and the transactions were not speculative transactions. From this order, the aforesaid question of law has been referred at the instance of the Commissioner.

4. Section 43(5) of the Act defines speculative transaction. It reads as under :

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

shall not be deemed to be a speculative transaction;"

5. From a bare reading of this sub-section, it is clear that though a transaction in which a contract for the purchase or sale of a commodity is settled otherwise than by actual delivery or transfer of the commodity has been defined as a speculative transaction, certain species of such transactions entered into under specific circumstances have been taken out of the definition by virtue of the three provisos thereto, the relevant proviso for our purpose being proviso (a) Proviso (a) clearly states that for the purposes of this clause 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 shall not be deemed to be a speculative transaction. This proviso is not confined to contracts in respect of raw materials entered into by persons in the course of their manufacturing business as has been sought to be contended by the Revenue before the Tribunal and now before us. We do not find any scope for giving such a construction to this proviso. The proviso is clear and unambiguous. It applies equally to cases of persons carrying on manufacturing as well as persons carrying on business of selling goods. There is no scope to confine it to manufacturers. In that view of the matter, we do not find any merit in the submission of the Revenue that the benefit of the proviso is available only to manufacturers in respect of purchase of raw materials. It clearly applies also to persons carrying on merchanting business. So far as the facts are concerned, the finding is clear as set out above. The requirements of this proviso are fully met in this case. Both the Appellate Assistant Commissioner and the Tribunal have arrived at a concurrent finding of fact. There is no challenge to this finding by raising any specific question in regard to its perversity or otherwise. Under the circumstances, the finding of fact is binding. If that be so, proviso (a) to section 43(5) clearly applies to the facts of the present case.

6. In view of the foregoing discussion, we are of the opinion that the Tribunal was justified in holding that the sum of Rs. 34,870 represented business loss and not speculation loss. The question referred to us is, therefore, answered in the affirmative and in favour of the assessee.

7. No order as to costs.