STATE OF TAMIL NADU

v.

M/S BURMAH SHELL OIL STORAGE & DISTRIBUTING CO. OF INDIA LTD. & ANR.

October 10, 1972

[K. S. HEGDE, P. JAGANMOHAN REDDY AND H. R. KHANNA, JJ.]

Madras General Sales Act 1959—The *amendment Act of* 1961 *and* 1964—*S.2 d(iii) whether before and after the amendment, the assessee is liable to Sales Tax for the sale of scrap and for the sale of tea and edibles in its canteen to its workmen.*

The respondents in these two appeals are Oil Companies and in C.A. No. 2119/69, the respondent under the Factories Act had to supply tea and edibles to its workmen for the Canteen established by it. It also supplied to its agents calenders, purses and key chains. Both the respondents also sell periodically as scraps, unserviceable oil drums, rubber hoses, jerry cans, rims etc.

In C.A. No. 2119/69, the respondent challenged the Sales Tax, levied under the Madras General Sales Tax Act 1959, in respect of advertisement materials, canteen sales, sale of scrap and the penalty. Whereas in C.A. No. 2120/69 only the Sales Tax levied in respect of sale of scrap and penalty had been challenged. In both these appeals, the turnover of sales for the assessment year 1964-65 was divided into 2 parts—(1) 1st April to 31st August 1964 and (2) 1st September 1964 to 31st March, 1965. The first part was governed by the Madras General Sales Tax Act, 1959, while the second part was governed by the Act after its amendment in 1964.

It was contended before the High Court that the Tribunal was wrong in holding that the Sales of publicity materials were chargeable to sales tax on the ground that (a) there was no sale at all by the assessee in the true sense; and (b) even if there was, it was not as a dealer. The High Court held in favour of the assessee on the ground that the assessee does not engage itself in trade of publicity materials, and that sale of scraps and canteen sales were not liable to tax following its earlier judgment in *Deputy Commissioner of Commercial Taxes, Coimbatore Division, Coimbatore*, v. *Shri Thirumagal Mills Ltd.*, 20 S.T.C. 287.

Before this Court, as regards the 1st part of the turnover, the appellant contended that even under the 1959 Act, before its amendment, transactions which are incidental to trade or commerce, whether or not profit has been made, are liable to tax. Secondly, after the amendments in 1964, the definition of 'business' and 'casual trader' has been changed to include (i) any trade, commerce etc. whether or not such trade is carried on with a motive to make profit or not. (ii) any transaction in connection with or incidental to such trade, commerce etc., and 'casual traders' meant any person who had occasional transactions of a business nature involving buying, selling etc. whether for cash or otherwise. Therefore, the assessment with respect to the second part of the turnover is also a valid assessment under the amendment Act. The respondent contended that under G.O. 2238 dt. 1st September 1964, canteen sales are exempt from tax. These were nevertheless included for assessment. Partly allowing the appeal,

HELD : (i) An attempt to realise price by sale of surplus unserviceable or discarded goods may enter the accounts of a trader and may on overall view, enhance his total profit; but it does not necessarily lead to an

A inference that business is intended to be carried on in those goods and the fact that unserviceable goods are sold does not lead to an inference that business is intended to be carried on in selling those goods. Therefore, the contention of the appellant, so far as the first part of turnover for 1964-65 is concerned, fails. [640G]

The State of Gujarat v. *Raipur Manufacturing Co. Ltd.* 19 S.T.C. 1, B referred to.

(ii) After the Amendments of 1961 and 1964 of the Madras General Sales Tax Act 1959, the definition of the word 'business' and 'casual trader' has changed considerably. Profit-motive is now immaterial and the concept of business in respect of matters falling under Sec. 2(d)(ii) in the commercial sense put forward and accepted in earlier cases must be abandoned. [642G]

C

Hyderabad Asbestos Cement Products Ltd. v. *State of Andhra Pradesh*, 30 S.T.C. 26 referred to.

(iii) In the present appeals, the sale of scrap consisted of spoiled drums, hose pipes etc., were all connected with the business of the Company. The assessee being an Oil Company, had to use oil drums, hose pipes D etc., as part of its trading activity and any sale of unserviceable goods as scrap is a transaction connected with its trade or commerce and the turnover in respect of the sale of the assessee's advertisement materials, such as, calendars, wallets etc., are all given by the dealers to its customers for purposes of increase in sales etc., and therefore, it is also connected with the business of the assessee. The respondents, therefore, had been rightly assessed. [643E]

E *A.P. State Road Transport Corporation* v. *Commercial Tax Officer*, 27 S.T.C. 42 and *State of Gujarat* v. *Raipur Manufacturing Co.*, 19 S.T.C. 1 discussed and distinguishes.

(iv) In view of the evidence that the assessee had brought to the notice of the Sales Tax Officer its claim and was willing to produce the accounts before him, the Sales Tax Officer will give an opportunity to the assessee to produce its accounts to show that it subsidised at least F 25% of the total expenses and in running the canteen in order to get relief under G.O. No. 2238 of the State Government. [645F]

CIVIL APPELLATE JURIDICTION : Civil Appeals Nos. 2119 & 2120 of 1969.

Appeals by special leave from the judgment and order dated G August 2, 1967 of the Madras High Court in Tax Cases Nos. 108 and 110 of 1967.

P. Ram Reddy, A. V. Rangam and *A. Subhashini,* for the appellants. (in both the appeals).

T. A. Ramachandran, for respondent (in C.A. No. 2119/ H 69.

S. T. Desai and *A. K. Varma,* for the respondent (in C.A. No. 2120/69).

A

The Judgment of the Court was delivered by

JAGANMOHAN REDDY, J.—These are two appeals by special leave against the judgment of the Madras High Court. In Appeal No. 2119/69 the chargeability to sales tax under the Madras General Sales Tax Act 1959 (hereinafter called the 'Act') as amended by Acts of 1961 and 1964 in respect of (1) advertisement materials (2) canteen sales (3) sale of scrap and (4) penalty have to be considered, while in Appeal No. 2120/1969 only the sales tax levied in respect of sale of scrap and penalty has been challenged. The respondents are oil companies and it appears in the first of the appeals the respondent under the factories Act had to supply tea and edibles to its workmen for the canteen established by it. It also supplies to its agents at cost price or less than the cost price advertisement materials such as calendars, purses and key chains. Both the respondents also sell as scrap periodically unserviceable oil drums, rubber hoses, jerry cans, rims, unserviceable pipe fittings and old furniture. The amount of turnover in respect of each if the items in the respective appeals is not relevant, but what is relevant is that in both the appeals the year 1964-1965 for which assessment is made on the turnover of sales is divided into two parts (i) 1st April to 31st August, 1964 and (ii) 1st September, 1964 to 31st March, 1965, the first part being governed by the 1959 Act while the second part is chargeable under the Act after its amendment in 1964 The definition of business, casual trader and dealer before and after the amendment is different and the question is, whether under the amended definition of the said terms on and after 1964, Act, attracts sales tax on the above transactions. In the High Court it was contended that the Tribunal was wrong in holding that sales of publicity materials were chargeable to sales tax on the ground that (a) there was no sale at all by the assessee in the true sense and (b) even if there was, it was not as a dealer. The High Court dealt with the latter aspect holding that the object of the respondent is not shown to be to engage itself in trade or commerce of publicity materials, and though it may be that the distribution of the publicity materials to the distributors is connected with the business of the assessee that will not be sufficient to make it a trade or an activity in a commercial sense. In this view it held that it was not a dealer nor is it its business carried on as a dealer. The High Court also held that the sale of scrap and canteen sales were not liable to tax following its earlier judgment in *Deputy Commissioner of Commercial Taxes, Coimbatore Division, Coimbatore* v. *Sri Thiromagal Mills Limited*(1)

B C D E F G H

It may be mentioned that in the original Act *viz.* The Madras Sales Tax Act, 1939 'dealer' was defined as meaning any person

(1) 20 S. T. C. 287.

A who carried on the business of buying and selling goods. In that Act there was no definition of a casual dealer nor of business. The 1959 Act defined these terms for the first time and by the Amending Act of 1964 the definition of business was substituted so as to do away with motive for making profit or the making of profit as elements in determining what constitutes a business. Even the B definition of casual trader in the 1959 Act was substituted by the Amending Act in 1961. These definitions are given below one against the other for facility of comparison :—

	1959 Act	After the 1961 and 1964 Amendment Act
C	Section 2 (d) "business includes (i) any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture, whether or not any profit accrues from such trade, commerce, manufacture, adventure or concern.	Section 2(d) "business" includes— any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture whether or not such trade, commerce, manufacture, adventure or concern is carried on with a motive to make gain or profit and whether or not any profit accrues from such trade, commerce, manufacture, adventure or concern, and
D	(e) "Casual trader" means a person who has, whether as principal, agent, or in any other capacity, occasional transactions of a business nature involving cash or for deferred payment, or for commission, remuneration, or other valuable consideration;	(ii) any transaction in connection with, or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern;
E	(g) "dealer" means any person who carries on the business of buying, selling, supplying or distributing goods, directly or otherwise, whether for cash, or for deferred payment, or for commission, remuneration or other valuable consideration, and includes	(e) "Casual trader" means a person who has, whether as principal, agent, or in any other capacity, occasional transactions of a business nature involving the buying, selling, supply or distribution of goods in the State, whether for cash, or for deferred payment, or for commission, remuneration or other valuable consideration, and who does not reside or has no fixed place of business within the State;
F	(i) ——	
	(ii) a casual trader;	
		(g) "dealer" means any person who carries on the business of buying, selling, supplying or distributing goods directly or otherwise, whether for cash, or for deferred payment, or for commission, remuneration or other valuable consideration, and includes—
G		(i) ——
		(ii) a casual trader;

H At the outset the learned advocate for the appellant did not press the contention in respect of the penalty having regard to the decision of this Court in *State of Madras* v. *Javaraj, Nadar &*

Sons(1). In so far as the business turnover for the first part of the assessable year 1964-65 is concerned it is not denied that the Act of 1959 prior to its amendment in 1964 is applicable. The contention that the 1964 amendment has retrospective operation was negatived in *State of Tamil Nadu* v. *Thirumagal Mills Ltd.*(2) but before this judgment was rendered the Sales Tax Tribunal had held that that part of the assessment is also covered by the 1964 amendment. But the learned advocate for the appellant nonetheless submits that even under the 1959 Act before its amendment to transactions which are incidental or anciliary to trade or commerce whether or not profit has been made, are liable to tax. This contention was clearly negatived in *State of Gujarat* v. *Raipur Manufacturing Co. Ltd.*(3) In this case which was under the Bombay Sales Tax Act 1953 where the definition of a dealer under s. 2(6) is *in pari materia* with s. 2(g), the disposal by a company carrying on the business of manufacturing and selling cotton textiles of its miscellaneous old and discarded items such as cans, boxes, cotton ropes, rags etc., was held by this Court not to be carrying on the business of selling these items of goods. It further stated that from the fact that the sales of these items were frequent and their volume was large it cannot be presumed that when the goods were acquired there was an intention to carry on the business in those discarded materials, nor are the discarded goods, by-products or subsidiary products of or arising in the course of manufacturing process. Shah, J. who spoke for the Court observed at pages 7-8 :

> "But the question is of intention to carry on business of selling any particular class of goods. Undoubtedly from the frequency, volume, continuity and regularity of transactions carried on with a profit-motive, an inference that it was intended to carry on business in the commodity may arise. But it does not arise merely because the price received by sale of discarded goods enters the accounts of the trader and may on an overall view enhance his total profit, or indirectly reduce the cost of production of goods in the business of selling in which he is engaged. An attempt to realize price by sale of surplus unserviceable or discarded goods does not necessarily lead to an inference that business is intended to be carried on in those goods, and the fact that unserviceable goods are sold and not stored so that badly needed space is available for the business of the assessee also does not lead to inference that business is intended to be carried on in selling those goods."

(1) 28 S.T.C. 700.

(2) 29 S.T.C. 290.

(3) 19 S.T.C. 1.

A The contention on behalf of the State in respect of the first part of the turnover for 1964-65 therefore fails.

With respect to the second part of the turnover the question whether the amendments in 1964 to the definition of "business" and "casual trader" are directly applicable has to be considered. B It will be observed that under the definition of "business" even commercial transactions carried on without a motive to make gain or profit, or whether or not any profit accrues from such activity are included in that definition. The amended sub clause (ii) also includes with that definition transaction in connection with or incidental or ancilliary to such trade, manufacture or C adventure or concern. The question is, whethtr the word "such" in sub-cl. (ii) of cl. (d) of s. 2 refers to the trade etc. defined in sub-cl. (i). It was contended before the Madras High Court that it is not so and that incidental or ancilliary activity must partake the nature of business in its generic sense. In *Dy. Commr. of Commercial Taxes* v. *Thirumagal Mills Ltd.* (supra) a Bench of that Court had held that not- D withstanding the amendment the presence or absence of profit will not make any difference. According to it what has to be considered is that the activity should be of a commercial character and in the course of trade or commerce and accordingly the definition of 'business' in the second clause was still one invested with commercial character inasmuch as the E reference was to "any transaction in connection with or incidental or ancilliary to any trade, commerce, manufacture, adventure or concern". It was observed that unless the transaction is connected with trade that is to say, it has something to do with trade or has the incidence or elements of trade or commerce it will not come within the definition. The Court observed :

F

> "The words 'in connection with or incidental or ancilliary to' in the second part of the definition of "business" in our opinion, still preserve or retain the requisite that the transaction should be in the course of business understood in a commercial sense. The intention of Madras Act 15 of 1964 does not appear to G be to bring into the tax net a transaction of sale or purchase which is not of commercial character."

In this view it held that the fair price shop which the assessee, a spinning mill manufacturing cotton yarn, had opened to make available to its workmen sale of commodities at fair prices could H not be said to be carrying on the business of selling commodities in the fair price shop in a trade or commercial sense even if profit accrued to it and it was therefore with reference to the fair price shop, not a dealer within the meaning of the Act. This decision

does not take note of the words "such" in the second sub-clause which in our view imports by reference the definition in sub-cl. (i) into that of sub-cl. (ii). A similar question came up for consideration before the Andhra Pradesh High Court on the analagous provisions of the Andhra Pradesh General Sales Tax Act in *Hyderabad Asbestos Cement Products Ltd.* v. *State of Andhra Pradesh*(1). In that case the assesee company maintained a canteen for the use of workers in compliance with the provisions of the Factories Act 1948 and the rules made thereunder. The question was, whether the turnover relating to the supplies of food and drink to the workers at the canteen could be charged to sales tax under the Andhra Pradesh General Sales Tax Act, 1957. The assessee contended that it was compelled by statute to provide and maintain a canteen for use of the workers, that the canteen was not run with a profit motive, as such it could not be said that there were any sales when food and drink were supplied to the workers at the canteen and that even if profit motive was not an ingredient of 'business' it must be established that the assessee intended to do business in food and drink before it could be subjected to the levy of sales tax. The Court held that in view of the definition of "business' as amended by the Amendment Act of 1966, proof of profit motive is unnecessary to constitute business and that the transaction of supply of food and drink to the workmen in the canteen maintained by the assessee, in pursuance of the Factories Act and the Rules, were sales and constituted business for the purpose of the Act. Dealing with the case of *Dy. Commissioner of Commercial Taxes* v. *Thirumagal Mills Limited* (supra) the learned Judges said that they were unable to agree with that case as the Madras High Court had not paid sufficient attention to the word "such" occurring in the second part of the definition which according to them obviously referred to the "trade, commerce, manufacture, adventure or concern" mentioned in the first part of the definition, that is to say, "trade, commerce, manufacure, advenure or concern' of which a motive to make gain or profit is not an essential requisite, nor was it permissible to hold that there was no "business in the commercial sense of 'business' with a motive to make profit, when such motive has been expressly declared unnecessary by the Legislature. In their view under both parts of the definition profit-motive is now immaterial and the concept of business in respect of matters falling under Sec. 2(d)(ii) in the commercial sense put forward and accepted in the earlier cases must be abandoned. We think the view adopted by the Andhra Pradesh High Court is in consonance with our own reading of the section which we have indicated earlier.

(1) 30 S. T. C. 26.

A The learned advocate for the respondent in the second of the appeals contended that the very two learned Judges of the Andhra Pradesh High Court had earlier rendered a decision in *A.P. State Road Transport Corpn.* v. *Commercial Tax Officer*(1) which is in conflict with the *Hyderabad Asbestos Cement Products Ltd.* case, and in the latter case the former case was neither referred B to nor distinguished by them. We think that this comment is the result of an insufficient appreciation of what was decided in the former case because therein the assessee was not a dealer and consequently a seller of scrapped vehicles and other scrap was not liable to be assessed. It was pointed out at the very outset that in view of the pronouncements of the Supreme Court, the C A.P. State Road Transport Corporation which is primarily constituted to provide an efficient, adequate, economical and properly co-ordinate system of road transport service could not be held to be a dealer carrying on the business in old and scrapped vehicles and other scrap and it could not be assessed to sales tax. The Commercial Tax Officer was not, therefore, right in holding D that the assessee Corporation was a dealer. The chargeable section, *viz.*, S3, makes every dealer liable to pay tax in respect of the turnover for the year and consequently the assessee not being a dealer cannot be assessed to tax under the Act. The sale of scrap in these appeals which as we have said earlier, consisted of spoiled drums, hose pipes etc. were all held to be connected with the business of the company. This finding is a finding of fact E but even otherwise the very nature of the particular scrap *prima facie* would indicate that they are connected with the business of the company. The assessee being an oil company has to use oil drums, hose pipes, jorry cans etc. as part of its trading activity and any sale of these unserviceable goods as scrap is a transaction connected with its trade or commerce. It is a contended by F the respondent that in *State of Gujarat* v. *Raipur Manufacturing Co.* (supra) this Court had observed at p. 9 that the miscellaneous, old and discarded items such as stores, machinery, iron scrap, cans, boxes, cotton ropes, rags etc, were held to be not part of or incidental to the main business of selling textiles. This contention in our view does not take into account the context in G which that finding had been given. In that case, as already pointed out, what was held under analogous Bombay Sales Tax Act which was similar to that under the Madras Sales Tax Act prior to its amendment in 1964, the sale of scrap does not necessarily lead to an inference that business which was an element in determining the liability of the dealer for the turnover in such goods was intended to be carried on in those goods. This Court had H observed, it cannot be presumed, that when the goods were acquired

(1) 27 S. T. C. 42.

there was an intention to carry on business in those discarded material nor are the discarded goods by-products or subsidiary products or are produced in the course of manufacturing process; that they are either fixed assets of the company or are goods which are incidental to the acquisition or use of stores or commodities consumed in the factory and that when these go into the profit and loss account of the business and may indirectly be said to reduce the cost of production of the principal item, the disposal of those goods on that account cannot be said to be part of or incidental to the main business of selling textiles. As the scrap in that case was not held to be incidental to the acquisition or use of stores or commodities consumed in the factory, the turnover was not included but in the case of caustic liquor which is regularly and continuously accumulated in that tanks in the process of mercirisation of cloth, this Court held that that being a waste material it has still a market amongst other manufacturers or launderers as byproducts or subsidiary products in the course of manufacture. and the sale thereof is incidental to the business of the company. In the view we hold the scrap sold is certainly connected with the business of the company and the turnover in respect of this commodity is liable to tax. It cannot also be said that the turnover in respect of the sale of the assessees advertisement material at cost price or less than cost price is not connected with the business of the assessee. Calenders, wallets and key chains are all given by the dealers to its customers for purposes of maintaining and increasing the sales of the products of the assessee and is therefore connected with the business. What the assessee is doing is to facilitate the dealers to acquire at their cost such advertising materials of a uniform type approved by the assessee company which instead of allowing each of them to have these separately printed or manufactured, itself undertook to do so and supplied them to its dealers. The supply of such material is in our view being connected with the business is liable to be included in the turnover of the assessee.

It is pointed out by the learned advocate for the respondent in the first of the appeals that under G.O. 2238 dated 1st September 1964 the canteen sales are exempt and notwithstanding the fact that the assesee in that appeal has complied with the terms and conditions of that G.O. the canteen sales have not been excluded. The G.O. to which reference is made is in the following terms :—

> "III No. 336 of 1964.—In exercise of the powers conferred by section 17 of the Madras General Sales Tax Act, 1959 (Madras Act I of 1959), the Governor of Madras hereby exempts, with effect on and from the 1st September, 1964, the tax payable under the said

A Act on the sales by all canteens run by an employer or by the employers on Co-operative basis on behalf of the employer, under a statutory obligation without profit motive, provided that the employer subsides at least twenty-five per cent of the total expenses incurred in running the canteen.

B Under this G.O. what has to be established is that the assessee has subsidised at least 25% of the total expenses in running the canteen. The Sales Tax Officer disallowed this amount because the assessee had not produced the accounts. In the memorandum of appeal to the Appellate Assistant Commissioner the assessee characterised this statement as unfair as the Commercial Tax C Officer was invited to state what other records he required but he did not raise this point during the checking of the accounts. In support of this grievance a letter of the assessee's advocate to the officer was referred. In that letter it was stated that out of the turnover of Rs. 35,974-96 in respect of the canteen sales, the assessee had supplied free tea to the staff of the value of D Rs. 13,740-37. It was further mentioned in that letter that the assessee bears the expenses towards salaries and amenities provided for the employees in the canteen as also the electric charges and corporation taxes. It also provides free of charge all equipment including furniture and fittings and a rent free building for this canteen. It therefore prayed that the turnover be exempted under the aforesaid G.O. Neither the Appellate Assistant Com- E missioner nor the Sales Tax Tribunal considered this aspect nor did the assessee pray for producing any evidence before them. We think as the assssee had sufficiently brought to the notice of the Sales Tax Officer its claim and was willing to produce accounts it should be permitted to do so. The Sales Tax Tribunal will give an opportunity to the assessee to produce evidence to F show under the terms of G.O. 2238 it is entitled to exemption from the turnover in respect of the canteen sales.

In the result both the appeals are dismissed in respect of levy of penalty. They are partly allowed so far as they are related to scrap in respect of the second period, 1-9-64 to 31-3-65 and G dismissed in respect of the 1st period, 1-4-64 to 31-8-64. In so far as appeal 2119 of 1969 is concerned it is also partly allowed in respect of the advertisement materials for the period 1-9-64 to 31-3-65 and dismissed in respect of the 1st period, 1-4-64 to 31-8-64 and with respect to canteen sales the appeal dismissed in respect of the 1st period, 1-4-64 to 31-8-64 and allowed in H respect of the second period 1-9-64 to 31-3-65 and the matter remanded with the directions given above. There will be no order as to costs in both these appeals.

S.C. *Appeals partly allowed.*