STATE OF GUJARAT

v.

M/S. RAIPUR MANUFACTURING COMPANY LTD.

September 30, 1966

[J. C. SHAH, V. RAMASWAMI AND V. BHARGAVA, JJ.]

Bombay Sales-tax Act (3 *of* 1953), *s.* 2(6)—*Dealer—"Carries on business", test for.*

The respondent-Company was carrying on the business of manufacturing and selling cotton textiles. . In 1953-54, because cloth, the company sold (i) old discarded items such as stores, machinery, iron scrap, cans, boxes, cotton ropes, rags etc., (ii) coal; (iii) by-products such as "kolsi" or cinders, and waste caustic liquor. In the case of the first item the sales were frequent, the volume was large, and the price realised was credited in the profit and loss account of the Company, thus indirectly reducing the cost of production of the textiles. In the case of coal it was a commodity which the company required for its business and which had been purchased for use in that business. There was, however, no evidence as to what was the total quantity of coal purchased by the company and what percentage thereof was sold except that the value of the coal sold exceeded Rs. 16,000. In the case of the third item though the by-products could not be used by the company, they were goods which were produced continuously and regularly day after day in the Company's manufacturing process. and for which, there was a market. The sales-tax authorities brought the turnover from the sales of all these commodities to tax under the Bombay Sales-tax Act, 1953. The High Court, on a reference, held in favour of the Company.

In appeal to this Court,

HELD : (1) In disposing of miscellaneous old and discarded items, the Company was not carrying on business of selling those items. In order that receipts from the sale of a commodity may be included in the taxable turnover it must be shown that the assessee was carrying on business in that particular commodity, and to prove that fact it must be established that the assessee had an intention to carry on business in that commodity. The characteristics of volume, frequency, continuity and regularity indicating an intention to continue the activity of carrying on the transactions with a profit motive must exist. But no test is decisive of the intention to carry on the business, and the intention has to be inferred in the light of all the circumstances. Where a person comes to own in the course of his business of manufacturing or selling a commodity, some other commodity which is not a by-product or a subsidiary product of that business, and he sells that commodity, cogent evidence that he has intention to carry on business of selling that commodity would be required. In the present case, no presumption can be raised, on the facts, that when the goods were acquired there was an intention to carry on the business in those discarded materials, nor can it be said that the goods became part of or an incident of the main business of selling textiles, as they were not by-products or subsidiary products arising in the course of manufacturing textiles. [621 E-H; 624 B-C, E]

(ii) There were no circumstances existing at the time when the coal was purchased, or which have come into existence late, which establish an intention to carry on a business of selling coal. The burden of proving that the Company was carrying on the business of selling coal lay

A upon the Sales-tax Authorities and if they held against the Company merely because of the frequency and the volume of the sales, the inference cannot be sustained. [626 A-C]

(iii) The "Kolsi" or cinders and the waste caustic liquor were by-products or subsidiary products in the course of manufacture of textiles and sale thereof was incidental to the business of the Company. An intention to carry on business in those commodities may be reasonably B attributed to the Company and the turnover with respect to those two commodities would be liable to sales-tax. [624 G-H; 625 E-F]

Case law referred to.

Observation on p. 685 paragraph 7 in *Gorsi Dairy* v. *State of Kerala* [(1961) 12 S.T.C. 683] not approved.

C CIVIL APPELLATE JURISDICTION : Civil Appeal No. 603 of 1966.

Appeal by special leave from the judgment and order dated November 14th/15th, 1963 of the Gujarat High Court in Sales-tax Reference No. 3 of 1962.

N. S. Bindra and *R. H. Dhebar*, for the appellant.

D *S. T. Desai, C. C. Gandhi* and *I. N. Shroff*, for the respondents

The Judgment of the Court was delivered by

Shah, J. M/s Raipur Manufacturing Company hereinafter called 'the Company'—carries on the business of manufacturing and selling cotton textiles. In the account year 1953-54 the Com- E pany besides selling cloth sold coal and 25 different items of discarded or unserviceable goods and waste products from the factory. The goods sold may be classified under three heads :

(1) Old containers—cans, boxes etc ; discarded stores, machinery & iron scrap ; miscellaneous discarded items, such as, cotton ropes, chindis (rags) etc.

F (2) Kolsi (cinders), waste caustic liquor.

(3) Coal.

The Sales-tax authorities brought the turnover from sales of those commodities to tax under the Bombay Sales Tax Act, 1953 and their order was confirmed in appeal by the Sales Tax Tribunal. The Tribunal was of the view that "a cotton textile mill manages G to collect unserviceable articles in the course of manufacture of cloth" and since these articles have to be sold, if it is to survive as an economic unit, sales of those articles must be regarded "as part of the business of the textile mill" if the transactions of sale are large and frequent. The Tribunal did not deal with the sale of coal independently of the sale of other goods.

H At the instance of the Company, three questions were referred to the High Court of Gujarat, out of which one alone is material in this appeal :

"Whether on the facts and in the circumstances of the case, was the Tribunal correct in holding that the applicants were liable to be taxed on the sale of stores and old machinery and other sundry articles ?"

The High Court answered the question in the negative. With special leave, the State of Gujarat has appealed to this Court.

Section 5 of Bombay Act 3 of 1953 imposes a general tax at specified rates on his taxable turnover in respect of sale of goods upon every dealer who was liable to pay general tax under the Bombay Sales Tax Ordinance No. III of 1952 whose turnover in respect of all the sales exceeds Rs. 30,000/- during the year commencing on April 1, 1952. The expression "dealer" is defined in s. 2(6) as meaning "any person who carries on the business of selling goods in the State of Bombay, whether for commission, remuneration or otherwise . . .". Section 2(8) defines "goods" as meaning "all kinds of movable property other than newspapers, actionable claims, stocks, shares and securities, and includes all materials, articles and commodities." Section 2(13) defines "sale" as meaning "a sale of goods made within the State of Bombay for cash or deferred payment or other valuable consideration and includes any supply by a society or club or an association to its members on payment of price or on fees or subscription, but does not include . . ." Section 2(14) defines "sale price" as meaning "the amount payable to a dealer as valuable consideration for the sale of any goods, less any sum allowed as cash discount according to trade practice, . . .". "Turnover" is defined in s. 2(20) as meaning "the aggregate of the amounts of sale price received and receivable by a dealer in respect of any sale of goods made during a given period after deducting the amount, if any, refunded by a dealer to a purchaser, in respect of any goods purchased and returned by the purchaser within the prescribed period."

Under the Bombay Sales Tax Act, 1953, the aggregate of the price received and receivable by a person carrying on business of selling goods is liable to be included in his taxable turnover. It follows as a corollary that in the turnover of a person carrying on the business of selling one commodity will not be included the price received by him by sale of another commodity unless he carries on the business of selling that other commodity. That is so, because, within the meaning of s. 2(6) of Bombay Act 3 of 1953 to be a dealer a person must carry on the business of selling those goods, price whereof is sought to be included in the turnover. In other words, he must carry on the business of selling a commodity before his turnover from sale of that commodity is taxable. As pointed out by this Court in *State of Andhra Pradesh* v. *M/s Abdul Bakshi and Bros.*(1) a person to be a dealer must be engaged

(1) [1964] 7 S.C.R. 664 : A.I.R. 1965 S.C. 531.

A in the business of buying or selling or supplying goods. The expression "business" though extensively used in taxing statutes, is a word of indefinite import. In taxing statutes, it is used in the sense of an occupation, or profession which occupies the time, attention and labour of a person, normally with the object of making profit. To regard an activity as business there must be a course of B dealings, either actually continued or contemplated to be continued with a profit motive, and not for sport or pleasure. Whether a person carries on business in a particular commodity must depend upon the volume, frequency, continuity and regularity of transactions of purchase and sale in a class of goods and the transactions must ordinarily be entered into with a profit motive. By the use C of the expression "profit motive" it is not intended that profit must in fact be earned. Nor does the expression cover a mere desire to make some monetary gain out of a transaction or even a series of transactions. It predicates a motive which pervades the whole series of transactions effected by the person in the course of his activity. In actual practice, the profit motive may be easily discernible in some transactions : in others it would have to be in- D ferred from a review of the circumstances attendant upon the transaction. For instance, where a person who purchases a commodity in bulk and sells it in retail it may be readily inferred that he has a profit motive in entering into the series of transactions of purchase and sale. A similar inference may be raised where a person manufactures finished goods from raw materials belonging E to him or purchased by him, and sells them. But where a person comes to own in the course of his business of manufacturing or selling a commodity, some other commodity which is not a by-product or a subsidiary product of that business and he sells that commodity, cogent evidence that he has intention to carry on business of selling that commodity would be required. Where a F person in the course of carrying on a business is required to dispose of what may be called his fixed assets or his discarded goods acquired in the course of the business, an inference that he desired to carry on the business of selling his machinery or fixed assets or discarded goods would not ordinarily arise. To infer from a course of transactions that it is intended thereby to carry on business ordinarily the characteristics of volume, frequency, continuity and G regularity indicating an intention to continue the activity of carrying on the transactions must exist. But no test is decisive of the intention to carry on the business: in the light of all the circumstances an inference that a person desires to carry on the business of selling goods may be raised.

H A large number of cases were cited at the Bar in support of the contention that the goods sold by the Company must be deemed to have been sold as part of the business of the Company, and on that account the turnover in respect thereof was liable to taxation.

It is not necessary to enter upon a detailed examination of those cases, because a majority of those cases are merely illustrative of the general principles set out hereinbefore. A few representative cases may be briefly referred to. In *State of Bombay* v. *The Ahmedabad Education Society*(1) certain goods manufactured or imported by an Education Society for the purpose of its own use were, when found surplus, disposed of at cost, without any profit. The Bombay High Court held that no business of selling or supplying was intended to be carried on in those goods. In *State of M.P.* v. *Bengal Nagpur Cotton Mills Ltd.*(2) a Company which carried on the business of manufacturing textiles, supplied steel and cement on several occasions to their contractors, who were constructing buildings for the Company, and debited the price of the materials to the contractor's account. It was held that the Company was not liable to pay sales tax as the Company was not a dealer carrying on the business of selling steel and cement. In *Commissioner of Sales Tax, Madhya Pradesh, Indore* v. *Ram Dulare Balkishan and Bros.*,(3) a transport operator who sold unserviceable cars, trucks, tyres and motor accessories was held not to be a dealer even though the activity was "continuous, serious and large." In *The State of Mysore* v. *The Bangalore Woollen, Cotton and Silk Mills Co. Ltd.*,(4) the assessee a manufacturer of textiles who sold unserviceable goods like waste cotton, useless ropes, scrap iron, worn out and broken parts of machinery, old paper, and tubes, was held not to be a dealer. In that case, no distinction (presumably because there was no evidence in that case justifying the distinction) was made between waste cotton and other commodities sold.

It is clear from these cases that to attribute an intention to carry on business of selling goods it is not sufficient that the assessee was carrying on business in some commodity and he disposes of for a price articles discarded, surplus or unserviceable. It was urged, however, on behalf of the State that where a dealer with a view to reduce the cost of production disposed of unserviceable articles used in the manufacture of goods and credits the price received in his accounts, he must be deemed to have a profit motive, for it would be uneconomical for the business to store unserviceable articles and to survive as an economic unit. 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 of which he is engaged. An attempt to realize price by sale of

(1) 7 S.T.C. 497.
(2) 12 S.T.C. 333.
(3) 14 S.T.C. 202.
(4) 13 S.T.C. 106.

A 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 the inference that business is intended to be carried on in selling those goods.

B Counsel for the State strongly relied upon a judgment of this Court in *State of Andhra Pradesh* v. *H. Abdul Bakhi & Bros.*(1) in support of the contention that goods purchased for the purpose of being used in a manufacturing process are liable to purchase tax since the manufacturer must be deemed to be carrying on business of purchasing those goods. It was held in *H. Abdul Bakhi's* C case(1) that a person who consumes a commodity bought by him in the course of his trade or uses it in manufacturing another commodity for sale, is a dealer, since the Legislature has not made sale of the very article bought by a person a condition for treating him as a dealer. But the principle of that case has no application in the present case. In that case this Court declined to accept the D view which prevailed with the High Court of Andhra Pradesh that unless a person is carrying on business both of purchasing and selling the same commodity, purchase of articles used in the course of manufacture of another commodity is not in the course of carrying on the business of purchasing that article.

E Counsel for the State also relied upon the judgment of the Kerala High Court in *Gosri Dairy, Vyttila* v. *The State of Kerala*(2). In that case the assessee firm which was registered as a dealer in dairy products sold a part of its live-stock every year and replaced the same by fresh stock. The question arose whether the proceeds of such sales were to be treated as part of the turnover of the assessee liable to sales tax. It was held that the frequency, re- F gularity and volume of sale transactions by the assessee were such that they could be regarded as "an activity in the course of the business of the assessee", and therefore the assessee's sales of cattle were part of its business. The Court in that case inferred that the transactions by the assessee in respect of its assets disclosed an intention to carry on the business in those assets. We are not G concerned to decide in this case whether the ultimate decision of the Court was correct, but we are unable to agree with the view expressed by the High Court that "as regards sales tax all the sales of a dealer in the course of his business attract taxation". Merely because a person is carrying on business of selling a commodity, it cannot be inffered from sale by him of another commodity in the course of that business that he is carrying on business in that H other commodity also.

(1) A.I.R. 1965 S.C. 53. (2) 12 S.T.C. 683.

We may now consider whether the turnover from the goods sold by the Company was taxable. The goods sold broadly fall, as already observed, under three heads: *viz.*, old discarded machinery, stores and scrap and miscellaneous goods ; coal ; and by-products and subsidiary products such as "kolsi" and waste caustic liquor, though not usable by the factory are goods regularly and continuously produced in its manufacturing processes. We are unable to hold that in disposing of miscellaneous old and discarded items such as stores, machinery, iron scrap, cans, boxes, cotton ropes, rags etc. the Company was carrying on business of selling those items of goods. These sales were frequent and the volume was large, but 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 product of or arising in the course of the manufacturing process. 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. Those goods are sold by the Company for a price which goes into the profit and loss account of the business and may indirectly be said to reduce the cost of production of the principal item, but on that account disposal of those goods cannot be said to become part of or an incident of the main business of selling textiles. In order that receipts from sale of a commodity may be included in the taxable turnover, it must be established that the assessee was carrying on business in that particular commodity, and to prove that fact it must be established that the assessee had an intention to carry on business in that commodity. A person who sells goods which are unserviceable or unsuitable for his business does not on that account become a dealer in those goods, unless he has an intention to carry on the business of selling those goods.

But in dealing with the liability to pay tax on the price for sale of "kolsi" and "waste caustic liquor" different considerations arise. As found by the High Court "kolsi" (cinders) are small pieces of coal which are not fully burnt. It appears that "kolsi" is not capable of "extreme fuel potency required in the furnaces" of the appellant Company, but it is still capable of being used in "lighter furnaces". This "kolsi" is discharged from the furnaces regularly and continuously day after day. The Company collects that "kolsi" and sells it to intending purchasers in bulk. "Kolsi" would be appropriately regarded as a subsidiary product in the course of manufacture. "Kolsi" results from coal which remains unburnt : it is on that account a subsidiary product. When such subsidiary product is turned out in the factory regularly and continuously and is being sold from time to time, an intention to carry on business in "kolsi" may be reasonably attributed to the Company. In this connection, the principle in the judgment of the

A Bombay High Court in *The Aryodaya Spinning and Weaving Company Ltd* v. *The State of Bombay*(1) would apply. In that case a textile manufacturing Company produced "cotton waste" in the course of its manufacture of cloth and yarn. The cotton waste which was not required for use in the factory was disposed of regularly and the Bombay High Court regarded that as a subsidiary B product or incident of the business of the assessee. The normal business of the assessee in that case was the business of manufacturing and selling cotton textiles and cotton yarn, but it could still be regarded as allied or incidental to business activity. The same principle, in our judgment, applies to the disposal of "kolsi" which was discharged continuously and regularly out of the furC naces of the appellant Company.

"Waste caustic liquor" is also regularly and continuously accumulated in the tanks in the process of mercerisation of cloth. As pointed out by the High Court, sodium hydroxide in water is used in different processes for mercerisation of cloth. The liquid is kept in a tank in which cloth is dipped. After this process is over, D cloth passes through other tanks where water is sprinkled over it and in that process some of the sodium hydroxide falls into the tank. The liquid is a light solution of sodium hydroxide which cannot be used in the process of mercerisation, nor for other process in the factory of the Company. This waste material which is called "waste caustic liquor" has still a market amongst other manufacturers or launderers. For reasons which we have E already set out in dealing with "kolsi", we are of the view that waste caustic liquor may be regarded as a by-product or a subsidiary product in the course of manufacture and the sale thereof is incidental to the business of the Company and the turnover in respect of both "kolsi" and "waste caustic liquor" would be liable to sales tax.

F It appears from the statement furnished that coal of the value of Rs. 16,083/- was sold by the Company under 12 bills in the year 1953-54. Coal is purchased by the Company for the purpose of lighting its furnaces and heating boilers. A part of the coal purchased was sold. The Tribunal merely stated in respect of all the items of goods sold that looking to the volume and frequency G of their sale, the Company should be regarded as a dealer in respect of those goods. Unless there is evidence to show that there was an intention to carry on business of selling coal, the mere fact that coal of the value exceeding Rs. 16,000/- was sold will not by itself make the Company a dealer carrying on business in coal. We have no evidence on the record as to what the total quantity H of the coal purchased by the Company was, and what percentage thereof was sold. No investigation has been made as to the circumstances in which the coal came to be sold. Mere sale of a com-

(1) 11 S.T.C. 141.

modity which a Company requires for the purpose of its business and which has been purchased for use in that business will not justify an inference that a business of selling that commodity was intended, unless there are circumstances existing at the time when the commodity was purchased or which have come into existence later which establish such an intention. It may be pointed out that the burden of proving that the Company was carrying on business of selling coal lay upon the Sales-tax authorities and if they made no investigation and have come to the conclusion merely because of the frequency and the volume of the sales, the inference cannot be sustained. A B

On that view of the case, the answer recorded by the High Court on the first question will be modified as follows : C

> "In the negative, except as to 'kolsi' and waste caustic liquor".

There will be no order as to costs in this appeal.

V.P.S. *Appeal allowed in part.*