DIRECTOR OF SUPPLIES & DISPOSALS, CALCUTTA

v.

MEMBER, BOARD OF REVENUE, WEST BENGAL, CALCUTTA

April 24, 1967

[J. C. SHAH, S. M. SIKRI AND V. RAMASWAMI, JJ.]

Bengal Finance (Sales-tax) Act (6 of 1941), s. 2(c)—Dealer—Central Government disposing of surplus war material—If liable to sales-tax as dealer.

Section 2(c) of the Bengal Finance (Sales-tax) Act, 1941 defines a "dealer" as meaning any person who carries on the business of selling goods in West Bengal and as including the Government. The appellant was a widespread organisation of the Government of India set up for the disposal of surplus American war equipment which included goods of great diversity and which had been taken over by the Government of India after the Second World War. The Government of India received the equipment free of cost. A part of the equipment was appropriated by the Government of India to their own use, some equipment was sold to the State Governments and other autonomous bodies, and the rest was sold to the public. The sales were spread over a number of years and goods of the value of several lakhs had been sold in auctions held from time to time after advertising in newspapers.

On the question whether the appellant was a "dealer" and therefore liable to pay sales-tax,

HELD : (*Per* Sikri and Ramaswami JJ.) : In disposing of the goods the appellant was not carrying on the business of selling goods, and therefore, the appellant was not a "dealer" within the meaning of s. 2(c) of the Act, and, the transactions of sale were not liable to be taxed under the Act. The appellant was not selling the goods for profit but was merely disposing them of by way of realisation of capital. [786 B-D]

Commissioner of Taxes v. *British Australian Wool Realisation Association*, [1931] A.C. 224 (P.C.) applied.

State of Andhra Pradesh v. *M/s. Abdul Bakshi & Bros.*, [1964] 7 S.C.R. 664; 15 S.T.C. 644 (S.C.) and *State of Gujarat* v. *Raipur Manufacturing Co. Ltd.*, [1967] 1 S.C.R. 618; 19 S.T.C. 1 (S.C.), referred to.

Per Shah J. (*dissenting*) : It could be inferred from the totality of circumstances that the appellant was not merely realising capital, but was carrying on business, and was therefore a dealer within the meaning of s. 2(c) of the Act and liable to be assessed to sales-tax. [780 A, H]

It cannot be said that because the Government of India received the equipment free of cost it could not set up a business to dispose of that equipment. There was an organised course of activity which was systematic and with the set purpose of making profit; and the tests of volume, frequency, continuity and system generally applied for deciding whether there was an intention to carry on business were also satisfied. [779 G-H; 780 F-G]

Nurain Swadeshi Mills v. *Commissioner of Excess Profit Tax*, 26 I.T.R. 765 (S.C.) and *State of Andhra Pradesh* v. *Abdul Bakshi & Bros.*, [1964] 7 S.C.R. 664; 15 S.T.C. 644 (S.C.) referred to.

A *Commissioner of Taxes* v. *British Australian Wool Realisation Association Ltd.* [1931] A. C. 224 (P.C.) explained and distinguished.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 616 of 1966.

Appeal by special leave from the judgment and order dated
B November 26, 1964 of the Calcutta High Court in Sales Tax Reference No. 4 of 1962.

R. Ganapathy Iyer, V. D. Mahajan and *S. P. Nayyar*, for the appellant.

B. Sen, P. K. Chatterjee, G. S. Chatterjee for *P. K. Bose*, for the respondent.

C

SHAH, J. delivered a dissenting Opinion. The Judgment of SIKRI and RAMASWAMI, JJ. was delivered by RAMASWAMI J.

Shah, J. I regret my inability to agree with the view expressed by Ramaswami, J.

D Section 2(c) of the Bengal Finance (Sales Tax) Act, 1941, defines a "dealer" as meaning "any person who carries on the business of selling goods in West Bengal and as including the Government."

The Government of India set up an organisation—the Directorate of Disposals (United States Transfer Directorate)—to dis-
E pose of war equipment taken over by them from the American forces after the Second World War. This organisation had several branches under its control. A part of the equipment was appropriated by the Government of India to their own use; some equipment was sold to the State Governments and other autonomous bodies; and the rest was sold to the public. The taxing authorities
F held that the Directorate was a dealer within the meaning of the Bengal Finance (Sales Tax) Act, 1941, and the High Court of Calcutta in a reference made under s. 21(3) agreed with that view.

It is common ground that the Government of India paid no consideration for acquiring the equipment; they merely set up an
G organisation to dispose of the equipment. It is not, and cannot be argued that because the Government of India received the equipment free of cost it could not set up a business to dispose of that equipment. An owner of goods may commence business in those goods by converting them into stock-in-trade of his business. The sales made by the Government of India through the Directo-
H rate were not casual : they were spread over a number of years. The equipment included goods of great diversity which were disposed of with the help of a widespread organisation. The goods offered for sale were frequently advertised in newspapers and

auctions were held from time to time to dispose of the goods. Was the Government of India in entering upon this activity merely realizing capital or was it carrying on business in the American surplus war equipment ?

This Court observed in *The State of Andhra Pradesh* v. *H. Abdul Bakshi and Bros.*(1) :

> "The expression 'business' though extensively used 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 dealings, either actually continued or contemplated to be continued with a profit motive, and not for sport or pleasure."

In *Narain Swadeshi Weaving Mills* v. *Commissioner of Excess Profits Tax*(2), Das, J., delivering the judgment of the Court observed :

> "The word 'business' connotes some real, substantial and systematic or organised course of activity or conduct with a set purpose."

An owner of goods may dispose of his property in one lot or from time to time in different lots. By merely realizing the value of a capital asset, the owner does not become a dealer. Where, however, he sets up an organisation—a substantial and systematic course of activity—to sell the goods with a profit motive, he may in the light of other circumstances be deemed to have entered into an activity in the nature of business or trade. The line between the two classes of cases is thin and sometimes may be blurred. But in the present case, it cannot be said that the activity undertaken by the Government of India for disposal of the American surplus war equipment was merely an activity of the nature of realization of capital. There was an organised course of activity, it was systematic and it was with a set purpose of making profit. The tests of frequency, continuity and system which are generally employed in determining whether an activity for the disposal of goods owned by a person indicates an intention to carry on business are satisfied in this case. The inference does not arise merely from the existence of a selling organisation or systematic sales, but from the totality of circumstances.

In *Commissioner of Taxes* v. *British Australian Wool Realization Association Limited*(3), the Judicial Committee was called

(1) 15 S. T. C. 644. (2) 26 I. T. R. 765.

(3) [1931] A. C. 224.

upon to consider whether surplus resulting from sale of wool acquired for the purpose of the First World War was exigible to income-tax under the Income Tax Act, 1915 (Victoria; 6 Geo. 5 No. 2668). The Judicial Committee agreeing with the Supreme Court of Victoria held that the sale of surplus wool merely resulted in realisation of capital assets and no part of it was income chargeable to tax. The assessee Company was incorporated for the purpose of selling surplus wool originally acquired during the war. The Commonwealth Government of Australia transferred to the Company its undivided half of the Australian wool, and its share of profits already realised, in consideration of the issue of priority wool certificates and fully paid shares. The Company also agreed to sell on behalf of the British Government the rest of the wool for a commission. The proceeds of sale of the half share of the Australian wool exceeded the cost at which it had been taken into the books of the Company. After the priority wool certificates were redeemed, and the whole of the capital credited as paid on the shares was paid off, a large surplus remained in the hands of the Company. The Supreme Court of Victoria held that the surplus proceeds of the sale did not arise from trade, but were realization of capital assets and were therefore not taxable under the Income Tax Act, 1915, and with that the Judicial Committee agreed. The transaction was unusual. Vast quantities of wool had accumulated both in the hands of the British Government and of the Commonwealth Government: they had to be realized or wasted. It was of vital interest to the Commonwealth of Australia that the realization of surplus wool should not be conducted so as to destroy the market for the current production: it was also essential that the operation of realization should be conducted with due regard to the legitimate interests of the British consumers. With a view to devise an effective machinery to serve this twin objective, the Company which was to act as a common agency for disposal of surplus wool in the hands of the two Governments was set up with a nominal capital. The constitution of the Company was the direct result of an agreement between the two Governments, and the attainment of the Government purposes was secured by agreements which the Company entered into with the two Governments. The Government of the Commonwealth assigned the profits accrued from sales of surplus Australian wool, in consideration of fully paid up shares and priority certificates to be issued in the names of persons or bodies nominated by the Commonwealth Government. There was a separate agreement between the British Government and the Company about the disposal of wool belonging to that Government. Interest of the Commonwealth Government in the surplus wool—a sum exceeding £6 million was transferred to the Company, and it became an instrument of conversion of the whole of the surplus wool still unsold. For the share of the Commonwealth Government in the

wool it became a medium of distribution of the net surplus amongst the original suppliers of wool. The Company also took over the organization under which the realization of wool was proceeding for over two years before it was set up, "and a realization of surplus wool whose sole or even primary purpose was the acquisition of gain, whether by the Imperial Government in respect of one moiety, or by the Association or its members in respect of the other was never again entertained". The Judicial Committee observed at p. 249 :

> ". . . . in truth and in fact the Association's interest in the wool always was fixed capital and never was circulating capital. Its purpose with reference to it was to realize the asset, having done so to distribute the proceeds among those entiled and then itself to disappear."

The Judicial Committee again observed at p. 252 :

> "All that its British board did was to utilize on its behalf the organization under which they had acted when, as a committee of the Ministry of Munitions, they were engaged in the same task of realization. In other words, in their Lordships' judgment there is in the special case neither a finding, nor any statement of facts warranting the conclusion that this Association ever indulged in any activity except that of realization which, as Rowlatt, J., has said, 'is not a trade'. Upon the facts stated, any other conclusion would be tantamount to saying that a realization such as that effected by the Association must be a trade because of the bringing into existence of a selling organization made necessary only by reason of the mere magnitude of the realization—a proposition not to be entertained."

I have stated the facts of the case before the Judicial Committee and the reasoning of the Board in some detail to indicate that the case bears little analogy with the case we are dealing with. I am unable to hold that a case which has been decided on its very special facts can be deemed to be an authority governing the present case. The decision of the Judicial Committee enunciates no new principle : it applies settled principles to a very unusual set of facts.

There is no finding by the Sales Tax Tribunal that the Directorate was only set up for realization of the surplus equipment, and the High Court has declined to raise any such inference. The High Court has clearly found that the Directorate of Disposals (the United States Transfer Directorate) was carrying on business

A within the meaning of s. 2(c) of the Bengal Finance (Sales Tax) Act, 1941. It is difficult to upset that finding of the High Court in an appeal with special leave, and to hold that on the facts established the Directorate of Disposals was not carrying on business of selling goods.

B The appeal must therefore fail.

Ramaswami, J. This appeal is brought, by special leave, from the judgment of the Calcutta High Court dated November 26, 1964 in a reference under s. 21(3) of the Bengal Finance (Sales Tax) Act, 1941 (Bengal Act VI of 1941), hereinafter referred to as the 'Act'.

C

The Director of Disposals, the United States Transfer Directorate, is an organisation of the Government of India. It is responsible for the disposal of surplus American war equipment which had been taken over by the Government of India. When the equipment was substantially disposed of, its work was reduced to a great extent and therefore it merged with the office of the D Regional Commissioner (Disposals) on January 11, 1950. Later on the Supply and Disposal Services of the Government of India were merged and the department was redesignated as Directorate of Supplies & Disposals. The function of this directorate was to dispose of surplus goods and to purchase goods on behalf of the Government of India. The Director of Supplies & Disposals E (hereinafter called the appellant') was asked by the Sales-tax officials of the West Bengal Government to get himself registered as a 'dealer' under the Act. The appellant declined to do so, contending that he was not a 'dealer' and that he was not engaged in the business of buying and selling and was therefore not liable to pay any sales-tax, but the contention of the appellant was over- F ruled and he was assessed to sales-tax for three periods from April 1, 1949 uptil May 31, 1951. The appellant took the matter in appeal to the Assistant Commissioner of Commercial Taxes, Calcutta who modified the orders of assessment, holding that the supplies made by the appellant were liable to be taxed except those which were proved to be mere transfers to its sister departments in the Government of India. The appellant filed revision peti- G tions to the Commissioner of Commercial Taxes and to the Board of Revenue, but these petitions were dismissed. As directed by the High Court, the Board of Revenue referred the following question of law for the decision of the High Court under s. 21(3) of the Act :—

H "Whether the Director of Supplies and Disposals, United States Transfer Directorate having his office situated at No. 6, Esplanade East, Calcutta, carries on the business of selling goods in West Bengal and is, there-

fore, a 'Dealer', within the meaning of section 2(c) of the Bengal Finance (Sales Tax) Act, 1941 ?" A

By its judgment dated November 26, 1964, the High Court answered the question in the affirmative and against the appellant.

The question to be considered in this appeal is whether the appellant is a 'dealer' within the meaning of s. 2(c) of the Act defining a 'dealer' as "any person who carries on the business of selling goods in West Bengal and as including the Government". It was argued on behalf of the appellant that the surplus material was left in India at the conclusion of the last war by the American Government to be dealt with by the Government of India just as it pleased. The Government could have used the goods itself or made a gift of them to others or thrown them away as scrap. As a matter of fact, it was pointed out that a considerable portion of the surplus material was used by the Government itself and the balance instead of being thrown away was sold to the public, and that selling of such material did not involve carrying on of a 'business' and the appellant was therefore not liable to be taxed as a 'dealer' under s. 2(c) of the Act. The opposite view-point was put forward on behalf of the respondent. It was submitted that surplus material was sold in a series of transactions and goods of the value of several lakhs had been sold and there was a profit motive behind the transactions. It was contended that the sales were not casual but they were spread over a number of years and the surplus goods were disposed of with the help of a widespread organisation. It was also said that the goods which were offered for sale were advertised in the newspapers and auctions were also held from time to time. 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 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 dealings, either actually continued or contemplated to be continued with a profit-motive; there must be some real and systematic or organised course of activity or conduct with a set purpose of making profit. To infer from a course of transactions that it is intended thereby to carry on business ordinarily there must exist the characteristics of volume, frequency, continuity and system indicating an intention to continue the activity of carrying on the transactions for a profit. But no single test or group of tests is decisive of the intention to carry on the business. It must be decided in the circumstances of

B C D E F G H

(1) 15 S.T.C. 644.

A each particular case whether an inference could be raised that the assessee is carrying on the business of purchasing or selling of goods within the meaning of the statute.

In a recent decision of this Court in *The State of Gujarat* v. *Raipur Manufacturing Co. Ltd.*(1) the question arose whether a B company which carried on the business of manufacturing and selling cotton textiles was liable to sales-tax when disposing of old and discarded items such as stores, machinery, iron scrap, cans, boxes, cotton ropes, rags, etc. It was held that the mere fact that the sales of the items were frequent and their volume was large did not lead to the presumption that when the goods were acquired C there was an intention to carry on the business in these discarded materials, and a person who sold goods which were unserviceable or unsuitable for his business did not on that account become a dealer in those goods, unless he had an intention to carry on the business of selling those goods. At page 7 of the Report Shah, J. speaking for the Court, observed as follows :—

D "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 un- E serviceable 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 parti- F cular 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 G 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 H sold and not stored so that badly needed space is available for the business of the assessee also does not lead to

(1) 19 S.T.C 1.

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

Having examined the facts found by the High Court in the present case, we are satisfied that the appellant was not carrying on the business of buying or selling goods within the meaning of s. 2(c) of the Act. It is not disputed that large quantities of war material were handed over to the Government of India under the provisions of the Indo-U.S. agreement for the prosecution of the war. A part of the war material was used by the Government for defence and military activities and there was a huge surplus left with the Government of India which was either no longer useful or had become obsolete. We are of the opinion that in disposing of this surplus war material the appellant was not carrying on the business of selling goods and the transactions of sale were not liable to be taxed under the provisions of the Act. In our opinion, the appellant was not selling surplus goods for profit but he was merely disposing of the surplus material by way of realisation and the transactions were therefore not taxable as sales falling within the provisions of the Act. The view that we have expressed is borne out by the decision of the Judicial Committee in *Commissioner of Taxes* v. *British Australian Wool Realization Association Limited*(1) in which the respondent-company was incorporated in 1920 in Victoria pursuant to an agreement between the Imperial and Commonwealth Governments, for the purpose of selling the undisposed of surplus of wool acquired for the war, and distributing the proceeds. The Commonwealth Government transferred to the company its undivided half of the Australian wool and in cash its share of profits already realized, in consideration of the issue of priority wool certificates and fully-paid shares to its nominees, the wool suppliers. The company also agreed with the Imperial Government to sell on its behalf for a commission all the rest of the wool, whether Australian or not. The wool was all sold during the years 1921 to 1924; the company had no other dealings in wool. The proceeds of the half share of the Australian wool largely exceeded the sum at which it had been taken into the books of the company. The priority wool certificates were redeemed, and the whole of the capital credited as paid on the shares was paid off under successive schemes sanctioned by the Court; there remained a large surplus in the hands of the liquidator of the company. Assessments were made upon the company under the Income Tax Act, 1915, of Victoria, in respect of proportions of the surplus proceeds of sale and of the commission earned. The company raised objections thereto, and a special case was stated for the opinion of the Supreme Court of Victoria which held that the surplus proceeds of sale were not a result of the trade but realization of capital assets and were therefore not

B C D E F G H

(1) [1931] A.C. 224.

A taxable under the Act. The judgment of the Supreme Court of Victoria was affirmed by the Judicial Committee which held that the surplus resulted merely from the realisation of capital assets and therefore no part of it was income chargeable to tax. At page 250 of the Report, Lord Blanesburgh stated as follows :—

B "To their Lordships, therefore, there is disclosed, on their view of the facts here, a case entirely within the terms of the following words from the judgment in *Californian Copper Syndicate* v. *Harris* [(1904)5 Tax Cas. 159, 165], which have since been so often cited with approval : 'It is quite a well settled principle in dealing with questions of assessment of income tax, that where C the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit..... assessable to income tax.' Equally applicable, in the view of their Lordships, are the words of Lord Dunedin in *Commissioner of Taxes* v. *Melbourne Trust* [(1914) D A.C. 1001, 1009], where he says : 'If the liquidator of one of the banks had made an estimate of the various assets held by him for realization, and then on realization had obtained more than that estimate, such surplus would not have been profit assessable to income tax."

E Lord Blanesburgh further observed at page 252 of the Report :

"All that its British board did was to utilize on its behalf the organization under which they had acted when, as a committee of the Ministry of Munitions, they were engaged in the same task of realization. In F other words, in their Lordships' judgment there is in the special case neither a finding, nor any statement of facts warranting the conclusion that this Association ever indulged in any activity except that of realization which, as Rowlatt, J. has said, 'is not a trade.' Upon the facts stated, any other conclusion would be tantamount to saying that a realization such as that effected by the G Association must be a trade because of the bringing into existence of a selling organization made necessary only by reason of the mere magnitude of the realization—a proposition not to be entertained."

The material facts of this case are closely parallel to those in the H present case and it must be held that the appellant was not carrying on the business of selling goods and was not a "dealer" within the meaning of the Bengal Finance (Sales Tax) Act, 1941 (Bengal Act VI of 1941).

For these reasons we hold that the appellant did not carry on the business of selling goods in West Bengal and therefore was not a dealer within the meaning of s. 2(c) of the Act and the question referred to the High Court under s. 21(3) of the Act must be answered in the negative and in favour of the appellant. We accordingly set aside the judgment of the High Court dated November 26, 1964 and allow this appeal with costs.

A

B

ORDER

In accordance with the opinion of the majority, this appeal is allowed with costs.

V.P.S.