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STATE OF ORISSA

v.

M/S ORISSA ROAD TRANSPORT CO. LTD.
ETC. ETC.

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AUGUST 28, 1997

[SUHAS C. SEN, B.N. KIRPAL AND K.T. THOMAS, JJ.]

Sales Tax:

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Orissa Sales Tax Act, 1947—Sections 4 and 2(c)(iv), (bb) & (b)—Liability to pay sales tax—State Transport Company disposing of unserviceable, old, obsolete and unutilised parts from its store periodically—Held, Transport Company is a dealer carrying on the business of selling such parts without being registered as a dealer under the Act—Hence liable to pay sales tax :

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Practice & Procedure ;

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New plea—Omission on the part of the State to point out the relevant statutory provision, culminating in a wrong decision by High Court—Plea thus was a legal one—Held, it cannot be contended that this Court also should not refer to that provision—However, the contention would have been correct if applicability of the legal provision depended on the investigation of facts.

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The respondent company's main business was providing transport facilities to the travelling public by way of plying buses. Apart from that it was disposing of unserviceable, old, obsolete and unutilised parts from its stores at yearly intervals. The respondent did not get itself registered as a dealer under the Orissa Sales Tax Act. The Sales Tax Officer made an order of assessment under Section 15(5) of the Act seeking to tax the respondent's turnover on such sale, and also levied penalty as the respondent had failed to get itself registered under the Act. The appeal filed by the respondent before the Assistant Commissioner, Sales Tax was dismissed. Second appeal was then filed by the respondent before the Additional Sales Tax Tribunal which accepted the contention of the respondent that it was not a dealer within the scope of the Act for the purpose of levying tax. However the Tribunal referred the matter to the High Court

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and the High Court held that respondent was not a dealer and was not liable to pay sales tax. Hence this Appeal by the State. A

Allowing the appeal, the Court

HELD : 1. In the course of carrying on its business of providing transport, some obsolete parts, spare parts etc., are not required by the respondent company. As a prudent business organisation, the respondent sells such items, which were obviously used or intended for use in its business, when there was no requirement for them. It cannot be accepted that such sales cannot even be regarded as occasional sales of a business nature which would make the respondent a casual dealer within the meaning of that expression occurring in Section 2(bb) of the Orissa Sales Tax Act, 1959. Hence, the respondent will have to be regarded as a dealer carrying on the business of selling spare parts etc. and, therefore liable to pay sales tax on the sale of such items. [597-H, 598-A-B, D] B C

State of Tamil Nadu v. Burmah Shell Oil Storage and Distributing Co. of India Ltd., (1973) 31 STC 426 and District Controller of Stores, Northern Railway, Jodhpur v. The Assistant Commercial Taxation Officer & Anr., (1976) 37 STC 423, relied on. D

State of Gujarat v. Raipur Manufacturing Co. Ltd., (1967) 19 STC 1, distinguished. E

Andhra Pradesh State Road Transport Corporation, Hyderabad v. The Commercial Tax Officer, (1971) 27 STC 42 and The State of Andhra Pradesh v. Andhra Pradesh State Road Transport Corporation, (1989) 74 STC 336, referred to. F

2. It is true that apparently the attention of the High Court was not drawn to Section 2(bb). This, however, can be of no assistance to the respondent assessee because on the facts as found by the Tribunal it is evident that the provisions of Section 2(bb) are clearly attracted to the instant case. If the High Court has ignored a relevant statutory provision and then come to a wrong conclusion that cannot be a ground for the respondent to contend that this Court also should not refer to that provision. The contention of the respondent would have been correct if the applicability of Section 2(bb) depended on the investigation of facts and H G

A that is not the case herein. [599-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2034-38 of 1982 Etc.

B From the Judgment and Order dated 28.10.81 of the Orissa High Court in S.J.C. Nos. 90, 175, 194, 195-196 of 1977.

Raj Kumar Mehta for G.S. Chatterjee, Raj Kumar Mehta, P.N. Misra and Mrs. Kirti Mishra for the appearing parties.

C The Judgment of the Court was delivered by

KIRPAL, J. In these appeals by special leave what arises for consideration is whether the respondent is liable to pay sales tax and to be registered as a dealer under the relevant provisions of the Orissa Sales Tax Act, 1947 (hereinafter referred to as the 'said Act').

D The respondent's main business is of running of buses and providing transport facilities to the travelling public. Along with these services the respondent has been disposing of unserviceable, old, obsolete and unutilised parts from its stores. These parts used to be disposed of at yearly intervals. The respondent did not get itself registered as a dealer under the said Act. According to it, no business was being carried on in respect of which any sales tax could have been levied.

E The Sales Tax Officer considered that the respondent was liable to pay tax. He accordingly made an order of assessment under Section 12(5) of the said Act seeking to tax the respondent's turn-over on the sale of unserviceable old parts, obsolete parts, spare parts, sale of fuel, oil and supply of material utilised in body building to the State Transport service. The Assessing Authority also levied penalty inasmuch as the respondent had failed to get itself registered under the Act.

F The respondent filed an appeal against the aforesaid decision before the Assistant Commissioner, Sales Tax, but was not successful. Second appeal was then preferred to the Additional Sales Tax Tribunal, Cuttack. The Tribunal accepted the contention of the respondent and came to the conclusion that the respondent could not be regarded as a dealer within the scope of the said Act for the purpose of levying tax.

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On an application being filed the Tribunal referred the following three questions of law to the High Court :

"(a) Whether on the facts and in the circumstances of the case, the Member, Addl. Sales Tax Tribunal, was legally correct in holding that in respect of the transactions in spare parts and sale of fuel, oil etc. at cost the assessee is not a dealer as per Section 2 (c) of the Orissa Sales Tax Act, 1947?"

(b) Whether on the facts and in the circumstances of the case, the Member, Addl. Sales Tax Tribunal is correct to hold that purchases of new spare parts and accessories of such vehicles as Ford, Chevrolet, Despot, Dodge, etc. were not made with an intention to carry on business of selling the same?"

(c) Whether on the facts and in the circumstances of the case, the Member, Addl. Sales Tax Tribunal, is legally correct to hold that the assessee is not a dealer as per Section 2 (c) of the Orissa Sales Tax Act, 1947 in respect of the sale turnover of unutilised new spare parts?"

The High Court vide its judgment answered all the aforesaid questions in favour of the respondent and held that it had not carried on any business as a dealer and, therefore, was not liable to payment of sales tax.

On behalf of the appellant it is contended that though the main business of the respondent was of carrying passengers but the sale of spare parts and other items must be regarded as being incidental to that business and, therefore, the turn-over in respect of the said sales was liable to tax.

Mr. P.N. Misra, learned counsel for the respondent, however, submitted that respondent was not in the business of selling goods and, therefore, such sales could not form part of its taxable turn-over and the respondent was not obliged to register itself as a dealer under the said Act. Our attention was drawn to a few decisions in an effort to show that the respondent could not be regarded as carrying on business of selling the spare parts etc. The first case which was relied upon was that of *State of Gujarat v. Raipur Manufacturing Co. Ltd.*, (1967) 19 STC 1. In that the company was carrying on the business of manufacturing cotton textiles, sale

- A of old discarded goods, coal, by-products and subsidiary products. In determining with regard to such sales the company could be considered as carrying on business, this Court held that whether a person carries on business in a particular commodity must depend upon the volume, frequency, continuity and regularity of transaction of purchase and sale in a class of goods and the transactions must ordinarily be entered into with a profit motive. In other words irregular sales of small quantities of old discarded goods could not be regarded as carrying on of a business activity. Volume, frequency, continuity etc. of purchase and sales in those items was the determining factor. This principal has been followed by the Andhra Pradesh High Court in *Andhra Pradesh State Road Transport Corporation, Hyderabad v. The Commercial Tax Officer*, (1971) 27 STC 42 and the *State of Andhra Pradesh v. Andhra Pradesh Road Transport Corporation*, (1989) 74 STC 336.

- D The relevant provisions of the Orissa Act are first required to be examined in order to see whether the aforesaid decisions can support the respondent's contentions. Section 4 of the said Act is a charging section. It, *inter alia*, provides that every dealer whose gross turn-over during the year exceeds the specified limit shall be liable to pay tax under the said Act on the sales and purchases effected by it. The expression 'dealer' has been defined in Section 2(c) of the Act. The relevant portion of the said definition is as follows :

- F "(c) 'Dealer' means any person who carries on the business of purchasing, selling, supplying or distributing goods (including goods used or involved in the execution of works contract, whether as goods or in some other form), directly or otherwise, whether for cash or for deferred payment or for commission, remuneration or other valuable consideration and includes,-

- G (i).....
 (ii)
 (iii)
 (iv) a casual dealer;"

- H The expression 'casual dealer' has been defined in Section 2 (bb) and is as follows :

"(bb) 'Casual dealer' means a person, who has, whether as principal, agent or in any of the capacity occasional transactions of a business nature involving purchasing, selling, supplying or distributing goods in the State whether for commission, remuneration or otherwise." A

The expression 'business' has been defined in Section 2(b) and is as follows: B

"(b) 'business' includes -

(i) 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 gain or profit accrues from such trade, commerce, manufacture, adventure or concern; and C

(ii) any transaction in connection with or incidental or ancillary to such trade commerce, manufacture, adventure or concern." D

The decision of this Court in Raipur Manufacturing Co. Ltd. case cannot be made applicable here. In that case this Court considered the volume, frequency, continuity and regularity of transactions of purchase and sales being an important element in determining whether a business was being carried out apart from the element of profit making being there. Hence in the Orissa Act the expression 'dealer' includes a casual dealer. A casual dealer define in Section 2(bb) is one who has occasional transactions of a business nature involving purchasing, selling, supplying or distribution or goods, whether for commission, remmuneration or otherwise. This means that even if a person did not have a systematic or an organised business involving regular transactions of purchases and sales he could still be regarded as a causal dealer if he entered into occasional transactions of a business nature involving purchases, sales etc. of the goods. In the cases cited by Mr. Misra there was no consideration of this aspect at all. E F G

It cannot be denied that the respondent is a business organisation whose activity is that of providing road transport. In the course of its carrying on of the said busines some obsolete parts, spare part etc. are not required by it. As a prudent business organisation the said items, which were obviously used or intended for use in its business, are sold when there H

A is no requirement for them. We find it difficult to accept that such sales cannot even be regarded as occasional sales of a business nature which would make the respondent a casual dealer within the meaning of that expression occurring in Section 2(bb) of the said Act. In the case of *State of Tamil Nadu v. Burnmah Shell Oil Storage and Distributing Co. of India Ltd. and Anr.* (1973) 31 STC 426 this Court was concerned, *inter alia*, with the sale of scrap where the definition of the word business in the Madras General Sales Tax Act had done away with motive for making profit as being a relevant consideration in determining whether the assessee carried on business or not. Section 2(d) of the Madras Act was similar to the present definition in Section 2(b) of the Orissa Act and it included the words "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". In connection with the sale of scrap it was observed at page 433 as follows :

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"In the view we hold that 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 assessee's advertisement materials at cost price or less than cost price is not connected with the business of the assessee. Calendars, 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."

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In the *District Controller of Stores, Northern Railway, Jodhpur v. The Assistant commercial taxation Officer and Anr.*, [1976] 37 STC 423, this court was concerned with a question whether the sales of unserviceable material and scrap by the Northern Railway, Jodhpur, was exigible to sales

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tax. The Rajasthan Sales Tax Act had been amended and, like the Madras Sales Tax Act and the Orissa Sales Tax Act the definition of business had eliminated the profit making element and keeping this in view this Court held that the activity of the appellant in selling unserviceable material and scrap would be business within clause 1 of the definition of the word 'business' introduced by the amending Act. This Court held that even if it be assumed that the activity involved in selling unserviceable material and scrap-iron etc. may not amount to carrying on business in the normal connotation of that term, it would still be business within the meaning of the expression business occurring in the said Act. Such sales were, therefore, to be held to exigible to sales tax.

The definition of the word 'business' in the Orissa Act being *perimateria* with the definition of such expression in the Madras Act as well as the Rajasthan Act, the ratio of the decision in *Burmah Shell* case (Supra) and the *District Controller's* case (supra) would be clearly applicable in the instant case and, therefore, the respondent will have to be regarded as a dealer carrying on the business of selling spare parts etc. and thereby become liable to pay sales tax on the sale of such items.

It was submitted by Mr. Misra that neither the High Court nor the other authorities had gone into the question as to whether the respondent could be regarded as a casual dealer. It is true that apparently the attention of the High Court was not drawn to Section 2(bb). This, however, can be of no assistance to the respondent because on the facts as found by the Tribunal it is evident that the provisions of Section 2 (bb) are clearly attracted to the instant case. If the High court has ignored a relevant statutory provision and then come to a wrong conclusion that cannot be a ground for the respondent to contend that this Court should also not refer to the said sub-section. The contention of the respondent would have been correct if the applicability of Section 2(bb) depended on the investigation of facts and that had not been done. However, the facts as found here clearly disclose that the respondent has to be regarded at least as a casual dealer. The mere fact that the High Court over-looked the said provision cannot be a ground for the respondent to contend that this Court should not go into that question.

In our opinion the High Court was not right in concluding that the

A respondent was not a dealer who was liable to pay sales tax on the sales of the spare parts etc. made by it. We accordingly allow these appeals and answer the questions of law in the negative and against the respondent. There will be no order as to costs.

R.K.S.

Appeals allowed.